Petition

81-1918

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROCKINGHAM MACHINE-LUNEX COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in affirming the National Labor Relations Board's "totality of circumstances" finding that the Petitioner violated its duty to bargain in good faith where that finding was expressly based upon the content of proposals tendered at the bargaining table. More specifically, when Petitioner offered a complete contract, whether the Board improperly grounded its holding that Petitioner violated the National Labor Relations Act on Petitioner's alleged (1) granting of only "minimal" economic and noneconomic concessions, (2) failing to include a dues checkoff provision and (3) omitting or modifying certain provisions which had been tentatively approved.

2. Whether the Eighth Circuit erred in affirming the National Labor Relations Board's conclusion that the strike called by the union during contract negotiations was an unfair labor practice strike when there was no record evidence establishing that alleged unfair labor practices caused or prolonged the strike.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
A. The Eighth Circuit's Approval of Contract Content Evaluation Is In Conflict With Decisions of This Court and Other Courts of Appeals and Presents a Question Important to the Administration of the National Labor Relations Act	5
B. The Eighth Circuit's Automatic Unfair Labor Practice Strike Rule Is Contrary to Well-Settled Precedents of All Other United States Courts of Appeals.	11
CONCLUSION	15
APPENDIX A (DECISION OF THE COURT OF APPEALS)	A1
APPENDIX B (DECISION OF THE NATIONAL LABOR RELATIONS BOARD)	B1
APPENDIX C (ORDER DENYING PETITION FOR REHEARING)	C1
APPENDIX D (STATUTORY PROVISIONS)	D1

TABLE OF AUTHORITIES

PAGE

Cases

Associated Grocers, 253 N. L. R. B. 31 (1980), *enforced*, ____ F. 2d ____, 109 LRRM 2360 (D. C. Cir. 1981) 13

Atlas Metal Parts Co. v. *NLRB*, 660 F. 2d 304 (7th Cir. 1981) 10

Carbon Fuel Co. v. *United Mine Workers*, 444 U. S. 212 (1979) 10

Church Point Wholesale Grocery, 215 N. L. R. B. 500 (1974), *enforced sub nom.* 538 F. 2d 1199 (5th Cir. 1976) 10

H. K. Porter Company v. *NLRB*, 397 U. S. 99 (1970) 10

Latrobe Steel Co. v. *NLRB*, 630 F. 2d 171 (3d Cir. 1980), *cert. denied*, ____ U. S. ____, 102 S. Ct. 104 (1981) 12

Local 1976, Carpenters v. *NLRB*, 357 U. S. 93 (1958) 14

Mastro Plastics Corp. v *NLRB*, 350 U. S. 270 (1956), *reh. denied*, 351 U. S. 980 (1956) 11

NLRB v. *American National Insurance Company*, 343 U. S. 395 (1952) 5, 6, 9, 10

NLRB v. *Colonial Haven Nursing Home, Inc.*, 542 F. 2d 691 (7th Cir. 1976) 12

NLRB v. *James Thompson & Co.*, 208 F. 2d 743 (2d Cir. 1953) 13

NLRB v. *Insurance Agents' International Union*, 361 U. S. 477 (1960) 5, 6, 7, 10

NLRB v. *Katz*, 369 U. S. 736 (1962) 7

NLRB v. *Scott & Scott*, 245 F. 2d 926 (9th Cir. 1957) 12

PAGE

NLRB v. *Tomco Communications, Inc.*, 567 F. 2d 871 (9th Cir. 1978) 10

NLRB v. *Truitt Mfg. Co.*, 351 U. S. 149 (1956) 7

Pease Company v. *NLRB*, 666 F. 2d 1044 (6th Cir. 1981) 7, 10

Pennco, Inc., 212 N. L. R. B. 677 (1974) 13

Pittsburgh-Des Moines Corp. v. *NLRB*, 663 F. 2d 956 (9th Cir. 1981) 8, 10

Soule Glass & Glazing Co. v. *NLRB*, 652 F. 2d 1055 (1st Cir. 1981) 12

Teamsters v. *Oliver*, 358 U. S. 283 (1959) 10

Winn Dixie Stores, Inc. v. *NLRB*, 448 F. 2d 8 (4th Cir. 1971) 12

Winter Garden Citrus Products Co-op. v. *NLRB*, 238 F. 2d 128 (5th Cir. 1956) 12

STATUTES

28 U. S. C. § 2101(c) 2

28 U. S. C. § 1254(1) 2

29 U. S. C. § 158(a)(1) 3, D1

29 U. S. C. § 158(a)(3) 3, D1

29 U. S. C. § 158(a)(5) 2, 3, 5, D1

29 U. S. C. § 158(d) 2, 5, 6

29 U. S. C. § 160(c) 2, 13, D2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROCKINGHAM MACHINE-LUNEX COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, ROCKINGHAM MACHINE-LUNEX COMPANY,[1] respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 8, 1981.[2]

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[1] Pursuant to Rule 28.1 of the Rules of the Court, Petitioner states that it has no parent company, subsidiary or affiliate.

[2] The Company filed a timely Petition for Rehearing on December 28, 1981. The order denying that Petition, dated February 4, 1982, is reproduced herein as Appendix C.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 665 F. 2d 303 and is reproduced herein as Appendix A. The opinion of the National Labor Relations Board is reported at 255 N. L. R. B. No. 15 and is reproduced herein as Appendix B.

JURISDICTION

The Company sought review of the Board's decision in the Court of Appeals pursuant to the provisions of 29 U. S. C. § 160(e). The judgment of the Court of Appeals was entered on December 8, 1981.[3] On December 28, 1981, the Company filed a timely Petition for Rehearing which was denied on February 4, 1982 (Appendix C). This Petition for Certiorari was filed within ninety days of the denial of the Petition for Rehearing in accordance with the requirements of 28 U. S. C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are sections 8(a)(5), 8(d) and 10(c) of the National Labor Relations Act, as amended, 29 U. S. C. §§ 158(a)(5), 158(d) and 160(c). They are reproduced herein in Appendix D.

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[3] Although the International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW) and its Local 2077 was a party to the proceedings before the Board, it was not a party to the proceedings before the Eighth Circuit on appeal.

STATEMENT OF THE CASE

In its decision below, the National Labor Relations Board found that the Petitioner, ROCKINGHAM MACHINE-LUNEX COMPANY, violated sections 8(a)(1), (3)[4] and (5) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 151 *et seq.* Preliminarily, the Board found that the union approved the Company's bargaining procedure whereby the Company negotiator's bargaining table agreements were tentative, subject to ratification by the Company's principals (B2). The Board did not allege that the Company committed any *per se* violations of the Act, but concluded that the Company violated § 8(a)(5) because the complete contract proposal it tendered to the union (1) granted only "minimal" economic and noneconomic concessions, (2) did not concede a dues checkoff provision and (3) omitted or modified provisions which had been tentatively approved (B2, 72). The Board further found that the strike which subsequently ensued at the Petitioner's plant was an unfair labor practice strike even though there was no record evidence that alleged unfair labor practices precipitated or prolonged the strike (B74, *see infra* note 10).

On July 13, 1981, the Petitioner filed a Petition to Review and Set Aside the Order of the National Labor Relations Board with the Eighth Circuit Court of Appeals arguing, *inter alia*, that the Board exceeded its authority by (1) improperly judging the reasonableness and content of the Company's proposals and (2) absolving the General Counsel of his burden of proving the strike was precipitated or prolonged by unfair

[4] Although the Company contests the validity of the Board's finding that the Company violated sections 8(a)(1) and 8(a)(3) of the Act in the administration of its vacation pay plan and by alleged threats made by the Company supervisors, the Company does not urge this error as a basis for review before this Court. These statutory provisions are also reproduced in Appendix D.

labor practices. The Board cross-petitioned for enforcement of its order, arguing that its reliance on the content of the bargaining proposals was entirely proper and that the strike was automatically an unfair labor practice strike because it followed unfair labor practices (Board Brief at 44).

On December 8, 1981, the Eighth Circuit issued its decision, denying Petitioner's Petition for Review and granting the Board's cross-application for enforcement; the court agreed with the Board's content analysis of the Company bargaining proposals but provided no explanation for its summary affirmance of the Board's unfair labor practice strike finding (A4).

On December 28, 1981, Petitioner filed a Petition for Rehearing which was denied on February 4, 1982 (C1). Petitioner now seeks review of the Eighth Circuit's decision in this Court.

REASONS FOR GRANTING THE WRIT

A.

The Eighth Circuit's Approval Of Contract Content Evaluation Is In Conflict With Decisions Of This Court And Other Courts Of Appeals And Presents A Question Important To The Administration Of The National Labor Relations Act.

This case presents an important variation of the tension between the twin bargaining policies of the Act that parties need not make concessions on any specific terms but are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. As their analytic tool for finding the Company bargained in bad faith, the Eighth Circuit and Board resolved this tension by focusing on what they perceived to be inadequate substantive proposals by the Company. To justify this approach the Board (B64) (but not the Eighth Circuit) invoked the required phraseology "totality of circumstances." *NLRB* v. *Insurance Agents' International Union,* 361 U. S. 477, 486, 498 (1960) (recognizing tension; Board may draw inferences from "conduct . . . as a whole"); *NLRB* v. *American National Insurance Co.,* 343 U. S. 395, 409 (1952) (articulating "facts of each case" standard). The Act, however, in proscribing bad faith bargaining (29 U. S. C. § 158(a)(5)), does not test substantive adequacy but instead focuses on willingness to agree to a contract. The proviso to section 8(d) of the Act, which defines the duty to bargain,[5]

[5] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, ...

29 U.S.C. § 158(d).

specifically declares that the duty *"does not compel either party to agree to a proposal or require the making of a concession."* 29 U. S. C. § 158(d) (emphasis added).

As this Court explained in *Insurance Agents'*, 361 U. S. at 486-87, the legislative purpose in amending the Act to include this language was to prevent the Board from regulating the substantive terms of collective bargaining agreements under the guise of enforcing the parties' duty to bargain in good faith. Congress sought to prevent the Board from misusing the good faith or "totality of circumstances" test to force employers to yield to union demands lest they be found guilty of having committed an unfair labor practice. *Id.* at 486. As this Court stated in *American National Insurance*, the powers of the Board in bargaining cases are carefully circumscribed: "the Board may not, either *directly* or *indirectly*, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements" or "se[t] itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." *Id.* at 404 (emphasis added, footnotes omitted). For "Congress provided expressly that the Board should not pass upon the *desirability* of the substantive terms of labor agreements." *Id.* at 408-09 (emphasis added). These limits on the Board's authority effectuate the underlying purpose of the Act which is designed to promote industrial peace by encouraging *voluntary* agreements between employers and unions. *Id.* at 401-02. In sum, the polestar is not contract content but the parties' *"desire to reach ultimate agreement, to enter into a collective bargaining contract." Insurance Agents'*, 461 U. S. at 485 (citations omitted, emphasis added).

Departing from this standard, the Board and Eighth Circuit improperly relied on contract content to find the Company bargained in bad faith. Their resort to content here abused the good faith or "totality of circumstances" standard

applicable in non *per se* cases. In a *per se* unlawful bargaining case—where, for example, a company makes unilateral changes in wages (e.g., *NLRB* v. *Katz*, 369 U. S. 736 (1962)), or refuses to furnish the union with relevant information (e.g., *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149 (1956))—a company may be found guilty of violating the Act regardless of its underlying motivations. In contrast, in a "totality" case, where a company is not accused of committing any *per se* violations of the Act, bargaining conduct which is not in and of itself unlawful must be evaluated. The Act is violated only if a company does not have a desire to reach ultimate agreement, to enter into a collective bargaining contract.

The essential inquiry, then, is not the Company's generosity, contract content, or even economic pressure exerted through the Company's bargaining tactics. *Insurance Agents'*, 361 U. S. at 494-95 (no inconsistency between economic pressure and good faith bargaining). Rather, the issue is whether the Company's bargaining conduct was inconsistent with a desire to reach an ultimate agreement, an issue that has relevance for even single labor negotiation taking place in this country today. Here, the Board and Eighth Circuit never even attempted to evaluate Petitioner's conduct in these terms. Both simply found that, on the basis of the content of its proposals, the Company bargained in bad faith. Both ignored the fact that such proposals were contained in a *complete contract offer* which, the record is uncontroverted, the Company was ready and willing to sign (B34, 41-42).

In dramatic conflict with the Eighth Circuit's decision here is *Pease Company* v. *NLRB*, 666 F. 2d 1044 (1981), where the Sixth Circuit recently denied enforcement to a decision in which the Board adopted a similarly flawed approach. In finding that the employer had merely engaged in lawful hard bargaining the court reasoned:

> The Company correctly notes that the "acceptability" of its proposals to the Union is the touchstone from which

> all the Board's findings of bad faith emanate. This approach has led the Board astray, because good faith bargaining does not require that Company to make proposals that are acceptable to the Union . . . .
>
> A lack of good faith may not be found merely because a party attempts to secure provisions that the other party deems unacceptable, but rather may be found only from "conduct clearly showing an intent not to enter into a contract of any nature." *NLRB* v. *United Clay Mines*, 219 F. 2d 120, 125 (6th Cir. 1955).
>
> * * * *
>
> The proper standard, then, is not whether the Company made proposals which were acceptable to the Union, but rather, whether the Company desired "to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB* v. *Insurance Agents*, 361 U. S. 477, 485 (1960).

Id. at 1049.[6] Thus, where, as here, the Board relies on contract content to find bad faith rather than on desire to enter into a contract, it transforms the "totality of circumstances" standard into a device to achieve that which the Act expressly proscribes.

Moreover, the specific content shortcomings identified by the Board and the Eighth Circuit as evidence of bad faith bargaining—refusal to agree to dues checkoff (A4, B66) and alleged minimal concessions (A4, B71)[7]—have been expressly rejected by this Court and the courts of appeals as a sufficient basis for finding a violation. *E.g.*, *American National Insurance*, 343 U. S. at 404, 408-09 (Board cannot compel con-

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[6] In *Pittsburgh-Des Moines Corp.* v. *NLRB*, 663 F. 2d 956, 959 (1981) the Ninth Circuit also noted that the Board must show that the company's attitude was inconsistent with a desire to reach agreement before a finding of failure to bargain is warranted and that relying on the content of contract proposals is inappropriate.

[7] While the Company contests the accuracy of this characterization of its concessions, these mistakes of fact are not urged as error here.

cessions or pass judgment on desirability of substantive terms); *H. K. Porter Company* v. *NLRB*, 397 U. S. 99, 103-04, 110 (1970) (government is not party to negotiations and may not impose its views of a desirable settlement; Board cannot compel agreement on dues checkoff); *Atlas Metal Parts Co.* v. *NLRB*, 660 F. 2d 304, 308-09 (7th Cir. 1981) (employer may not be found guilty of an unfair labor practice for failing to agree on a dues checkoff provision since "refusal to bargain cannot be equated with 'refusal to recede from an announced position'" [quoting *Church Point Wholesale Grocery Co.*, 215 N. L. R. B. 500, 502 (1974), *enforced sub nom., Oil, Chemical and Atomic Workers International Union, AFL-CIO* v. *NLRB*, 538 F. 2d 1199 (5th Cir. 1976)]).[8]

In addition to its faulty content-based analysis, the Eighth Circuit and Board also focused on an alleged improper tactic: withdrawal of certain bargaining proposals (A4, B72). This tactic was declared unlawful even though the Board found that the parties had agreed upon a bargaining format whereby all agreements were to be considered tentative pending total agreement and ratification by the principals (B2). Thus, the Board sanctioned the parties' agreed bargaining format in principle, but found the Company violated the Act in actually

[8] It should be pointed out that here the Board found the Company's refusal to agree to dues checkoff was unlawful even though the Company (and *not* the Union) made counter proposals on this issue (B71). If the relevant inquiry is the parties' desire to reach agreement, the fact that there was movement in the Company's position, especially in the face of the Union's adamant stand on the issue, is simply not inconsistent with a willingness to reach agreement. In contrast, in *Atlas Metals*, not only did the employer refuse to recede from its refusal to agree to dues checkoff, such provisions had been contained in earlier contracts between the same parties. Moreover, given that the Company here made counterproposals, the Board's conclusion that the Company's position on dues checkoff was unlawful is indefensible since the fact that the Company made counter-proposals on arbitration persuaded the Board that the Company's position on that issue was lawful (B66).

utilizing it. This rationale is not only internally inconsistent, but the result is contrary to recent courts of appeals decisions in *Pittsburgh-Des Moines*, 663 F. 2d at 956[9] and *Pease Company*, 666 F. 2d at 1044, where the courts specifically validated tentative bargaining formats such as was employed here. *See also Insurance Agents'*, 361 U. S. at 490-91, 498 ("use of economic pressure . . . not at all inconsistent with the duty of bargaining in good faith"; Board does not have flexibility in "picking and choosing" economic weapons). This conflict presents a separate and compelling basis for this Court's review.

In sum, the Board here assumed the role of an interest arbitrator and usurped the power to regulate how generous an employer's concessions must be, even though under the clear terms of the Act, *Insurance Agents'*, and *American National Insurance* the employer is under no duty to make any concessions whatsoever. *See also Carbon Fuel Co.* v. *United Mine Workers*, 444 U. S. 212, 218-19 (1979); *H. K. Porter Co.*, 397 U. S. at 195-08; *Teamsters* v. *Oliver*, 358 U. S. 283, 295-96 (1959). The Board's method of analysis, now encouraged by the Eighth Circuit, should be reviewed by this Court because "totality of conduct" cases otherwise will in some circuits turn on contract content and in others on desire to enter into a contract. In short, this Court's guidance is needed because the Board and lower courts are not applying the Act's commands in

[9] It is noteworthy that in *Pittsburgh-Des Moines*, 663 F. 2d at 960 the court observed that to bargain collectively "does not impose an inexorable ratchet, whereby a party is bound by all it has ever said." (Quoting *NLRB* v. *Tomco Communications, Inc.*, 567 F. 2d 871, 883 (9th Cir. 1978); only if the conduct at issue reveals an attitude inconsistent with a desire to reach agreement is a finding of failure to bargain warranted. Where, as here, a party modifies or withdraws provisions which by mutual understanding of the parties are purely tentative, an inference that such conduct was motivated by a desire to frustrate agreement is unwarranted. This is particularly true where, as here, alteration of earlier tentative agreements occurs in the context of formulating a complete contract which that party is willing to sign.

a consistent fashion. Finally, review is needed now to halt the Board's officious intermeddling with the collective bargaining process, which is inappropriate at any time, but is especially so in a severe recessionary economic climate. Indeed, concession bargaining, which has recently become a paramount economic necessity in many industries, will become impossible if labor unions are able to use the Board's willingness to assess content sufficiency to augment their economic power (or lack of it) to oppose concession bargaining. This question is important not only to Petitioner, but to employers and unions generally, and is critical to the consistent and evenhanded interpretation and implementation of public policy under the Act. Accordingly, Petitioner submits the issues herein presented are of extraordinary public importance and merit this Court's review.

B.

The Eighth Circuit's Automatic Unfair Labor Practice Strike Rule Is Contrary to Well-Settled Precedents of All Other United States Courts of Appeals.

As this Court established in *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956), *reh'g denied*, 351 U. S. 980 (1956), unfair labor practice strikers, unlike economic strikers, are entitled to significant privileges: back pay for the period of time between their unconditional offer to return to work and their actual reinstatement, and reinstatement whether or not they have been permanently replaced. Employers, correspondingly, suffer significant adverse consequences: effectively being required to pay double wages and firing strike replacements. This Court has never ruled, however, upon the question of whether the Board must prove by competent evidence that the strike was caused by unfair labor practices or whether a strike is an unfair labor practice strike automatically if unfair labor practices precede it. In *Mastro Plastics* the employer conceded that the strike was precipitated by its unfair labor practices. *Id.* at 291 (Frankfurter, J., dissenting).

The Board found that the strike involved here was an unfair labor practice strike even though General Counsel failed to adduce any evidence, by testimony or otherwise, that the strike was motivated or prolonged by the Company's alleged unfair labor practices and despite affirmative evidence to the contrary.[10] Recognizing this complete dearth of evidentiary proof, the Board on appeal argued that proof is unnecessary and that a strike which follows unfair labor practices is automatically an unfair labor practice strike: "the strike was an unfair labor practice strike even if the employees struck merely to put pressure on the company to gain more favorable terms" (Board Brief at 44). Without comment, the Eighth Circuit summarily affirmed this position.

In sharp contrast, the other courts of appeals have consistently required the Board to establish a causal evidentiary link between the strike and the alleged unfair labor practices, i.e., to prove by affirmative evidence that the strike had its genesis in unfair labor practices or was prolonged by those unfair labor practices. *See, e.g., Soule Glass & Glazing Co.* v. *NLRB,* 652 F. 2d 1055, 1079-80, 1106 (1st Cir. 1981); *Latrobe Steel Co.* v. *NLRB,* 630 F. 2d 171, 181 (3d Cir. 1980), *cert. denied,* ____ U. S. ____, 102 S. Ct. 104 (1981); *NLRB* v. *Colonial Haven Nursing Home, Inc.,* 542 F. 2d 691, 704 (7th Cir. 1976); *Winn-Dixie Stores, Inc.* v. *NLRB,* 448 F. 2d 8, 11 (4th Cir. 1971); *NLRB* v. *Scott & Scott,* 245 F. 2d 926, 929-30 (9th Cir. 1957); *Winter Garden Citrus Products Co-op.* v.

[10] The only explanation of causation was given by a union bargaining committee member: (1) the parties failed to agree on contract terms and (2) the Company's alleged footdragging (an alleged unfair labor practice of which the Board found the Company was *not* guilty). The only other witness to testify on this issue stated unequivocally that the Company's alleged unfair labor practices had nothing to do with her decision to strike, B42; Tr. 709, 723-24, 989).

NLRB, 238 F. 2d 128, 129 (5th Cir. 1956); *NLRB* v. *James Thompson & Co.*, 208 F. 2d 743, 749 (2d Cir. 1953); 29 U. S. C. § 160(c).[11]

In view of the potentially drastic impact a finding that a strike was an unfair labor practice strike may have, proof of causation should be required. After all, not only does an employer face the devastating financial burden of back pay liability, permanent replacements must be displaced. Moreover, absent proof that the strike was motivated or prolonged by unfair labor practices, it cannot be said that any part of the unemployment for which reinstatement and back pay is the remedy has resulted from the employer's violations of the Act. *See NLRB* v. *James Thompson & Co.*, 208 F. 2d at 749; 29 U. S. C. § 160(c).

Nonetheless, here the Board, with the silent imprimatur of the Eighth Circuit, took the position that it was enough that the strike was preceded by unfair labor practices regardless of the actual motivations of the striking employees. Thus, the question presented is not whether the Board's conclusion that the strike was an unfair labor practice strike is supported by substantial evidence, but whether such a conclusion may stand in the absence of any evidence establishing a causal link between the strike and the alleged unfair labor practices. Stated differently, this case presents the important policy question, never before considered by this Court, of whether a strike which follows unfair labor practices is automatically an unfair labor practice strike, even if the employees' purpose in striking is merely to secure more favorable economic terms.

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[11] Here, the Board even ignored its own rulings that affirmative evidentiary proof is mandatory. *See, e.g., Associated Grocers*, 253 N. L. R. B. 31, 33 (1980), *enforced*, ____ F. 2d ____, 109 LRRM 2360 (D. C. Cir. 1981); *Pennco, Inc.*, 212 N. L. R. B. 677, 679 (1974).

Here the Board, with the approval of the Eighth Circuit Court of Appeals, has taken a dangerous step, blurring the important distinction between economic and unfair labor practice strikers. Absent a requirement of establishing causation through affirmative evidence, employers may be forced to finance strikes commenced and continued as an exercise of economic force, merely because the employer first committed an unfair labor practiee that is totally unrelated to the strike. The potential impact on collective bargaining of such a drastic alteration of the balance of power envisioned by the Act cannot be overstated since the issue of strike causation is of potential relevance in every unfair labor practice proceeding in which a work stoppage occurs. *E.g., Local 1976, Carpenters* v. *NLRB*, 357 U. S. 93, 99-100 (1958) (NLRB reflects careful balancing of the differing powers and viewpoints of labor and management). Thus, whether the Board must prove that a strike was caused or prolonged by unfair labor practices in order to establish that a strike was an unfair labor practice strike is a question of extraordinary public importance that has never been and should be resolved by this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

ROCKINGHAM MACHINE-LUNEX v. N. L. R. B.

Cite as 665 F.2d 303 (1981)

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

ROCKINGHAM MACHINE-LUNEX COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 81-1327.

Submitted Nov. 10, 1981.

Decided Dec. 8 1981.

Seyfarth, Shaw, Fairweather & Geraldson, Charles C. Jackson, argued, Georgeanne H. Tilson, Chicago, Ill., for petitioner, Rockingham Machine-Lunex Co.

Andrew F. Tranovich, Jerrold Wohlgemuth, argued, Attys., William A. Lubbers, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, N. L. R. B., Washington, D. C., for the N. L. R. B.

Before HEANEY and McMILLIAN, Circuit Judges, and BENSON,* Chief Judge.

HEANEY, Circuit Judge.

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* The Honorable PAUL BENSON, Chief Judge. United States District Court for the District of North Dakota, sitting by designation.

This matter is before the Court on the petition of the Rockingham Machine-Lunex Company to review and set aside a decision and order of the National Labor Relations Board. The Board has cross-applied for enforcement of its order. It found that Rockingham had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* The Board's decision and order is reported at 255 N.L.R.B. 15 (1981).

[1] Rockingham contends that the Board's decision denies the company due process. Initially, Rockingham argues that the administrative law judge (ALJ) used evidence for purposes other than those for which it was admitted. It asserts that the ALJ relied on a transcript of negotiation sessions in finding that the company had refused to bargain in good faith despite his earlier ruling that the evidence would not be used for that purpose. The Board agreed in part with this assertion. It stated:

> At the hearing, the Administrative Law Judge ruled that the unauthenticated transcripts of the post-strike negotiation meetings were hearsay evidence but admissible for the limited purpose of showing the "essence" of what occurred at those negotiations. In his Decision, however, the Administrative Law Judge relied on the transcripts to establish the truth of the matters asserted in the transcripts. Notwithstanding his misplaced reliance on the transcripts, the record shows that the facts concerning those meetings were established by Respondent's authenticated notes concerning the meetings.

We agree with the Board's assessment and add that there is other evidence in the record that is more than sufficient to support the Board's findings, particularly the testimony of the company's chief negotiator, James Hodges.

[2, 3] Rockingham also points out that the ALJ ruled that evidence of an employee discharge by the company occurring outside the Section 10(b) statute of limitations period would be

admitted solely for "background" purposes. Rockingham argues that despite this ruling, the ALJ subsequently relied on that "background" evidence to find that the company committed unfair labor practices. We agree that the ALJ's reliance was improper. Nevertheless, we are again convinced that the other evidence in the record is sufficient to support the Board's findings.

Rockingham next contends that the ALJ and Board failed to mention or apply the adverse inference rule in violation of the company's due process rights. The rule provides that when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to the party. *International Union, United Auto Workers v. N. L. R. B.*, 459 F.2d 1329, 1336 (D.C.Cir.1972).

Rockingham argues that the General Counsel's failure to call as a witness union spokesperson Peter Kuchirka, who attended every negotiation session and filed the refusal to bargain in good faith charge, creates an inference that his testimony, presumably on the refusal to bargain issue, would be unfavorable to the union.

[4] The adverse inference rule is an important one that should be applied by the Board whenever it is appropriate. *E. g., Golden State Bottling Co. v. N. L. R. B.*, 414 U.S. 168, 174, 94 S.Ct. 414, 420, 38 L.Ed.2d 388 (1973); *International Union, United Auto Workers v. N. L. R. B., supra*, 459 F.2d at 1347. Rockingham, however, would expand the adverse inference rule to require that the failure to call Kuchirka obligates the Board to resolve all issues with respect to which he may have testified against the union. We do not believe that the rule reaches that far. The rule permits an adverse inference to be drawn; it does not create a conclusive presumption against the party failing to call the witness. *See* McCormick, Evidence, § 272, at 656-662 (2d ed. 1972). If we accepted Rockingham's

interpretation of the rule, the Board would have to call every witness on every conceivable issue relevant to establishing an unfair labor practice. This obviously is unnecessary.

[5] Here, the Board called as its principal witness Hodges, who testified at length as to precisely what took place at the bargaining sessions. He testified in substance that Rockingham rescinded or modified over a dozen provisions to which the parties previously had agreed, offered only minimal concessions to the union, and had a predetermined intention not to reach agreement on dues checkoff—a mandatory subject of bargaining. On this record, even if we draw an inference unfavorable to the union from Kuchirka's failure to testify and draw every favorable inference to the company that can be drawn from Hodges' testimony. Hodges' testimony, together with the undisputed evidence, is sufficient to justify the Board's finding that the company violated sections 8(a)(1) and (5) of the Act by refusing to bargain in good faith.

Finally, Rockingham argues that apart from its due process challenges, the Board's decision must be set aside as to each of the unfair labor practices found because it is not otherwise supported by substantial evidence. We disagree. We have carefully reviewed the record and briefs, and find that there is substantial evidence on the record as a whole to support the Board's order as to each unfair labor practice.

Rockingham's petition to set aside the order is denied, and the Board's cross-application for enforcement is granted.

APPENDIX B

255 NLRB NO. 15

United States of America
Before the National Labor Relations Board

Rockingham Machine-Lunex Company and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)	Case 33-CA-4272
and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and Its Local 2077	Case 33-CA-4566

DECISION AND ORDER

On September 30, 1980, Administrative Law Judge Thomas D. Johnston issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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[1] At the hearing, the Administrative Law Judge ruled that the unauthenticated transcripts of the post-strike negotiation meetings were hearsay evidence but admissible for the limited purpose of showing the "essence" of what occurred at those negotiations. In his Decision, however, the Administrative Law Judge relied on the transcripts to establish the truth of the matters asserted in the transcripts. Notwithstanding his misplaced reliance on the transcripts, the record shows that the facts concerning those meetings were established by Respondent's authenticated notes concerning the meetings.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the

(Footnote continued on following page.)

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Rockingham Machine-Lunex Company, Pleasant Valley, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. March 19, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

(Footnote continued from preceding page.)

resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Although we agree with the Administrative Law Judge that Respondent bargained in bad faith, thereby violating Sec. 8(a)(5) and (1) of the Act, we do not agree or rely on his finding that such bad faith was evinced by (1) Respondent's failure to vest its negotiator with "sufficient authority to conduct negotiations," inasmuch as the Union was aware of Respondent's negotiator's tentative authority and negotiated on that basis; (2) Respondent's submission of only 19 proposals in the first 10 sessions (Respondent's conduct here merely was reflective of the bargaining format the parties utilized wherein the parties bargained from the Union's proposed contract); and (3) Respondent's failure to document its statements that financial conditions might cause it to liquidate or close the plant, inasmuch as the Union never requested documentation thereof.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Rockingham Machine-Lunex Company

and Case 33-CA-4272

International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW)

and Case 33-CA-4566

International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW) and its Local 2077

Gerald V. Selvo, Esq., for the General Counsel.
Charles C. Jackson, Esq. and *Kevin Light, Esq.* (*Seyfarth, Shaw, Fairweather & Geraldson*), of Chicago, IL, and *Patrick W. Driscoll* (*Rehling, Lindburg & Gosma*), of Davenport, IA, for the Respondent.
Michael B. Erp, Esq. (*Katz, Friedman, Schur & Eagle*), of Chicago, IL, for the Charging Parties.

DECISION

Statement of the Case

THOMAS D. JOHNSTON, Administrative Law Judge: These consolidated cases[1] were heard at Rock Island, Illinois on

[1] The order consolidating these cases was issued by the undersigned on January 7, 1980.

November 19, 1979[2] and on January 22 through 25 and March 11 and 12, 1980 pursuant to a charge filed on May 10 in Case 33-CA-4272 by the International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW) (herein referred to as the Union) and a complaint issued in Case 33-CA-4272 on June 28, and pursuant to a charge filed on November 9 in Case 33-CA-4566 by the Union and International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW), Local 2077 (herein referred to as the Local), and a complaint issued on December 4.

The complaints, as amended prior to and at the hearing allege that Rockingham Machine-Lunex Company (herein referred to as the Respondent) violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein referred to as the Act), by unlawfully threatening employees if they engaged in a strike they would be considered to have quit; violated Section 8(a)(3) and (1) of the Act by refusing to pay striking unit employees their vacation benefits; and violated Section 8(a)(5) and (1) of the Act by unlawfully refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of Respondent's employees in the bargaining Unit during negotiations by refusing to agree to a Union dues check-off provision while authorizing check-off for the United Fund and United States Savings Bonds; offering only minimal concessions to the Union relative to non-economic matters; offering no concessions to the Union relative to economic matters; insisting on placing a 35-cent cap on an existing cost-of-living allowance; refusing to agree to arbitration as a final step of the grievance procedure provision; rescinding its agreement with the Union to a number of provisions they had previously agreed to and initialed; unwarranted and unreasonably delays in scheduling and holding of bargaining meetings; failing to vest its agent Hodges with sufficient authority to enter into binding agreements during negotiations; and by other acts

[2] All dates referred to are in 1979 unless otherwise stated.

and conduct when considered with the above demonstrates that the totality of Respondent's conduct was such as to show a lack of good faith in bargaining. It is further alleged that a strike engaged in by the employees was an unfair labor practice strike caused and/or prolonged by these unfair labor practices engaged in by the Respondent.

The Respondent in its answers dated August 31 and December 7, and amended at the hearing, denies having violated the Act. Further, the Respondent in its answer in Case 33-CA-4566 raised as affirmative defenses that certain acts alleged were not the subject of the charge and were also barred by Section 10(b) of the Act. Inasmuch as those acts occurring outside the Section 10(b) period were subsequently deleted from the complaint and the language of the charge, which alleged violations of Section 8(a)(1), (3) and (5) of the Act was otherwise sufficient to support the remaining allegations of the complaint these affirmative defenses lack merit and are hereby dismissed.

The Respondent at the hearing also amended its answer in Case 33-CA-4272 to raise Section 10(b) of the Act as an affirmative defense to paragraph 8(b)9 of the amended complaint which alleges the Respondent failed to vest its agent Hodges with sufficient authority to enter into binding agreements during negotiations. Since negotiations were conducted by Hodges within the Section 10(b) period such defense is hereby rejected.

The issues involved are whether the Respondent violated Sections 8(a)(1), (3) and (5) of the Act as alleged by unlawfully threatening employees for engaging in a strike, refused to pay certain striking employees their vacation benefits, refused to bargain in good faith with the Union, and whether the strike was an unfair labor practice strike.

Upon the entire record in these cases[3] and from my observations of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent[4] I hereby make the following:[5]

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, an Iowa corporation with its office and place of business located at Pleasant Valley, Iowa is engaged in the business of job contract machining. During the 12-month period preceding June 28, a representative period, the Respondent in the course of its operations sold and shipped finished products, valued in excess of $50,000, from its Pleasant Valley, Iowa facility to points located outside the State of Iowa and it purchased and received at its facility goods and materials, valued in excess of $50,000, which were transported there from states located outside the State of Iowa.

Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW) and the International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW), Local 2077, are each labor organizations within the meaning of Section 2(5) of the Act.

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[3] The Respondent's unopposed motion dated April 21, 1980 to correct the transcript is hereby granted.

[4] The Union did not file a separate brief but stated it joined in the brief filed by the General Counsel.

[5] The findings are based upon the pleadings, admissions, stipulations and undisputed evidence contained in the record which I credit.

III. THE UNFAIR LABOR PRACTICES

A. Background and the Bargaining Unit

The Respondent operates a plant located at Pleasant Valley, Iowa where it is engaged in the business of job contract machining.

Its official and supervisory personnel during the periods in issue included President Richard Schmidt, Secretary-Treasurer and Administrative Manager William Schmidt, General Manager Robert Zeaske Personnel Director Jean Anderson, Foreman Hill, and Work Superintendent Joe Eisenberg.[6]

President Schmidt has served as president since 1972 and on September 18, 1978 he and his wife acquired sole ownership of the Respondent from the estate of the former owner who died in June 1978.

On May 22, 1978, following a Board conducted election, the Union was certified by the Board as the exclusive representative for the purposes of collective bargaining of Respondent's employees in the following unit:

> All full-time and regular part-time production and maintenance employees including warehouse and shipping employees, truck drivers, janitors and leadman employed at the Employer's Pleasant Valley, Iowa facility; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The pleadings admit and I find the unit set forth constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Based upon the Union's certification and the presumption arising therefrom that its majority representative status contin-

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[6] These individuals were supervisors under the Act.

ues[7] I find contrary to Respondent's denial that the Union has been and is now the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

B. The Refusal to Bargain in Good Faith and the Strike

The Union, by letter dated June 12, 1978, from its Sub Regional Director Peter Kuchirka requested of the Respondent available dates to begin negotiations. President Schmidt responded by letter dated June 16, 1978, informing Kuchirka it was available to begin negotiations and Jim Hodges[8] would be in charge of negotiating for the Respondent.

Following an exchange of telephone calls between Kuchirka and Hodges, which were initiated by Kuchirka on June 21, 1978, the first negotiation meeting was held on June 30, 1978. This meeting, as were all subsequent negotiation meetings was held at the Clayton House in Davenport, Iowa. The Respondent's only representative at negotiations was Hodges while the Union was represented by Kuchirka, who served as its chief negotiator, and members of its negotiating committee including Luther Haney, James Martin, Chester Donaldson, and David Chadwick, who were also employed by the Respondent.

According to both President Schmidt and Hodges, Hodges was appointed by Schmidt prior to negotiations to serve as the Respondent's negotiator with the authority to negotiate the best contract they could achieve subject to final approval by Schmidt. The testimonies of Hodges, President Schmidt, and Secretary-Treasurer Schmidt establish that throughout the

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[7] See *Terrell Machine Company*, 173 NLRB 1480 (1969), enf'd. 427 F. 2d 1088 (C.A. 4, 1970).

[8] Howard "Jim" Hodges is a consultant who performs work for the Respondent and is its agent under the Act.

course of negotiations Hodges kept them apprised of what transpired at the negotiation meetings including agreements he had reached with the Union and they discussed those matters.

Hodges[9] testified at the June 30, 1978 negotiation meeting, which lasted about an hour, Kuchirka presented him with a proposed written contract. This proposed contract appears to be complete except for certain portions left blank. These portions were designated holiday pay; vacation; group insurance and pension program; wages and job classification with subheadings automatic wage progression, cost-of-living, year end bonus, attendance bonus, education program, loans and picnics; rates of pay for appropriate labor grade automatic progression; day work classification; funeral leave; general provisions; and the effective dates. Kuchirka informed Hodges those items left blank would be filled in later and explained what he thought about them and various items in the proposed contract. No proposals were given to the Union at this meeting.

Hodges informed them Respondent's owner had died and the company was for sale[10] or would be liquidated and it had also lost about $100,000 during the last few months of operations.[11] The 1978 unaudited loss was about $8,000.

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[9] Hodges was the only person who attended the negotiation meetings and testified about what transpired at those meetings concerning negotiations.

[10] President Schmidt stated prior to purchasing the Respondent he had informed Hodges it might be sold or purchased.

[11] According to President Schmidt the Respondent lost about $300,000 in 1976, was close to breaking even or made a little money in 1977, and lost money in 1978.

Hodges also mentioned July 3 would be celebrated as a holiday without pay while July 4 would be celebrated as a holiday with pay.[12]

Among other items discussed, Hodges reported checks under the Respondent's perfect attendance policy had been paid that day and he questioned the Union about whether it wanted to include as part of negotiations the case involving the discharge of employee Gordon Hyman, discussed *infra*.

Hodges reiterated the Respondent's position it would not meet during working hours or pay for negotiating time, whereupon Kuchirka informed Hodges he would file charges against him if he didn't change his position about not meeting during working hours. Although Hodges initially took the position the Respondent would only meet during nonscheduled working hours[13] this position, objected to by Kuchirka, was subsequently abandoned.[14]

Hodges also furnished the Union, as requested, with a list of employees and their dates of hire.

The second negotiating meeting was held on July 5, 1978. Hodges' testimony establishes he distributed what he referred to as a master list of those items to be resolved. This list included all those items contained in the Union's proposed contract to which corresponding numbers had been assigned by Hodges. Hodges then explained this was the approach he used in bargaining and said he was not ready to offer any counterproposals. However, Hodges did propose a one year contract while Kuchirka proposed a three year contract. Hodges informed them that because of the financial condition of the Respondent there was a possibility the 10-cent cost-of-living increase due to be paid the employees on August 7, might be withheld. Hodges repeated the Respondent would not pay for the July 3 holiday.

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[12] July 3 as discussed *infra*, had previously been announced as a paid holiday.

[13] Both President Schmidt and Hodges testified the Respondent was opposed to meeting during working hours because it needed the Union's committee members to work.

[14] The General Counsel at the hearing disclaimed the Respondent's initial position of only meeting during nonscheduled working hours as being an issue.

During the meeting Hodges again mentioned the Gordon Hyman case to see whether Kuchirka wanted to include it as an issue in negotiations, however, Kuchirka refused.

This meeting only lasted about 35 minutes. It ended after Kuchirka questioned Hodges about his authority to represent the Respondent and requested evidence to show it. Hodges' response was they could cancel meetings previously set at their initial meeting for July 6 and 7 until they got it resolved he was representing the Respondent.[15]

Hodges informed Kuchirka he would call him no later than July 11 about a meeting date and said he couldn't meet that Friday as suggested by Kuchirka.

Kuchirka also informed Hodges he was going to file charges against him for refusing to meet during working hours and over Respondent's refusal to pay for the July 3 holiday.

On July 7, 1978, the Union filed a charge with the Board in Case 33-CA-3811 against the Respondent alleging a refusal to bargain. On August 14, 1978 those portions of the charge relating to the Respondent's refusal to "discuss union contract proposals, to meet at reasonable times and for reasonable lengths of time, and to make counterproposals" was withdrawn. However, those portions of the charge relating to "unilateral change in working conditions and denying employees' established benefits" was not withdrawn.

On July 11, 1978, Hodges contracted Kuchirka and they agreed to meet on July 19, 1978. Hodges had suggested July 21, however, Kuchirka informed him he had an arbitration case and wanted a couple of days.

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[15] According to Hodges he had informed Kuchirka at the start of negotiations his agreements at the start of negotiations his agreements at the bargaining table would only connote tentative approval of the contract provisions.

The third negotiation meeting was held on July 19, 1978 and lasted from about 9 a.m. to about 1 p.m. Hodges distributed a letter from President Schmidt, dated July 18, 1978, addressed to Kuchirka reiterating its June 16, 1978 letter about Hodges being in charge of their negotiating with the Union.[16]

Hodges also showed Kuchirka a brochure about the Respondent being for sale.

Kuchirka, in the presence of Hodges and the Union's committee, called President Schmidt and inquired whether Hodges was representing the Respondent at the table and further told Schmidt that Hodges didn't know what he was doing and was a disgrace to the company. Although James Martin, a member of the Union's committee, testified he didn't recall Kuchirka calling Hodges a disgrace, he didn't deny it occurred.

President Schmidt acknowledged receiving a call from Kuchirka and confirming that Hodges was the Respondent's negotiator.

Following this call to President Schmidt approximately eighteen noneconomic issues were discussed. Hodges distributed copies of various proposals he had prepared using his own language or language from the Union's original proposal. Ten of these proposals were agreed to by Hodges and Kuchirka who both signed them. They included from the Union's original proposal Sections 2.1[17] and 2.2 dealing with purpose and relationship; Sections 3.1 and 3.2 dealing with nondiscrimination; Section 8.2 dealing with leave of absence for

[16] Neither the July 16 letter nor the July 19 letter mentioned Hodges' authority to negotiate was limited.

[17] The first number of each section refers to the article number of the Union's original proposal which are in Roman numerals.

pregnancy and Section 8.3 dealing with leave of absence for military service, except for the last sentence about the rights of employees enlisting in the Peace Corps which was deleted from the Respondent's proposal; Section 9.2 dealing with recognition of the shop committee; Section 12.10 dealing with seniority and Section 12.11 dealing with furnishing names to new employees.

The remaining three proposals agreed to set forth the agreement was between the company and the Union covering the unit employees; defined the term "employee"; and clarified the use of "he" or "his" as used in the agreement to also mean "she" or "hers" without any distinction.

It was not established what if any other issues were discussed.

Hodges and Kuchirka arranged to meet again on August 4. However, the reason for the delay was not established.

The fourth negotiation meeting was held on August 4, 1978 and lasted from about 8 a.m. until 10:35 a.m. Hodges' testimony establishes he indicated at the meeting he wanted to devote it to discussing leave of absence, grievance procedure and seniority including job bidding. Hodges had prepared a master check list entitled "Non-Economic Items After 7/19/78." This list contained eighteen items which had been crossed off by Hodges. They included the following provisions from the Union's original proposal: Section 5.7 dealing with pyramiding of overtime and/or premium rates[18]; Section 8.1 dealing with defining leave of absence and the basis for it and conditions; Section 8.4 and 8.5 dealing with leave of absences for Union business and holding Union office; Section 9.1 defining the term "grievance"; Section 9.1A dealing with the Union's right to inspect company records for investigation of grievances; Section 9.3A dealing with permission to leave jobs

[18] The evidence reflects this provision was agreed to in writing at the August 11 negotiation meeting.

to present or discuss grievances; Section 9.4 dealing with procedures for handling and processing grievances; Section 11.1 defining seniority; and Section 11.3 including subparagraphs a. through f. dealing with termination of seniority and employment.

Hodges first testified it appeared they resolved these eighteen items at this meeting. However, he subsequently stated they were crossed prior to the meeting to show what had been done and for use at the meeting and further stated he didn't recall whether he signed off on any documents at this meeting.[19]

Hodges and Kuchirka set the next negotiating meeting for August 11.

The fifth negotiation meeting was held on August 11. It lasted from about 9 a.m. until 2:45 p.m.

The testimony of Hodges establishes he provided the Union with a master list of the unresolved non-economic items along with five written proposals. Two of these proposals, which are the same as contained in the Union's original proposal, were agreed to and signed by both Kuchirka and Hodges. They were Section 4.1, which sets out the Respondent's right to manage its business and direct the work force and Section 5.7 dealing with pyramiding of overtime and/or premium rates.

The grievance procedure was also discussed and Section 9.6 of the Union's original proposal dealing with notification to an employee of the reasons for suspension and discharge and the procedure to be followed was agreed to. Also agreed to under the grievance procedure were three steps of the procedure to be followed in handling and processing grievances

[19] Counsel for the parties stipulated at the hearing that to the best of their knowledge no documents were signed off at the August 4 meeting.

which were proposed by the Respondent instead of those steps identified in the Union's original proposal as Section9.4a., 9.4b. and 9.4d. No agreement was reached on the other provisions of the grievance procedure discussed.

Seniority was also discussed and an agreement was reached on two provisions proposed by Hodges in place of those provisions proposed by the Union in its original proposal identified as Section 11.2 and 11.4. These provisions dealt with probationary employees and maintaining a seniority list. No agreement was reached on the other seniority provisions discussed.

Another proposal, submitted by Hodges dealing with job openings, layoff and recall, which was different than Article XII of the Union's original proposed contract was also discussed but no agreement was reached.

During this meeting Kuchirka questioned Hodges about whether he had ever worked with unions before and which ones he had negotiated with. Kuchirka informed Hodges he was going to picket the classes Hodges taught and tell other unions not to have anything to do with him and to boycott him. Kuchirka also cursed Hodges, said he was no good and told him to wait until the Respondent got busy and he was going to show everybody what kind of power he had and was going to fix him. Chester Donaldson, a member of the Union's committee, testified he didn't remember Kuchirka telling Hodges he would picket his classroom but did not deny such statements occurred. According to Donaldson both Kuchirka and Hodges used profanity against each other.

Hodges further testified Kuchirka repeated these statements at subsequent negotiation meetings and also said if they didn't get the issues resolved that President Schmidt's reputation would be damaged and the Union wouldn't support the charitable organizations Schmidt was on.

No date was set for the next negotiation meeting.

On August 14, 1978, Hodges stated he called Kuchirka about arranging a meeting that week and the following week and mentioned the non-economic list didn't look too bad and they could get into economics. However, Hodges informed Kuchirka he didn't have his schedule and would call him on Wednesday. On August 16, Hodges called Kuchirka and informed him he could not meet that week as he was preparing the Respondent's position. Hodges testified he told Kuchirka there seemed to be more talk about selling out and raising onions[20] but cautioned Kuchirka not to tell the committee because he didn't want any panic at the plant because they might close it down.

Hodges promised to call Kuchirka on Monday to set a date.

On August 21, Hodges called Kuchirka and they set a meeting date for August 28.

The sixth negotiation meeting was held on August 28 and lasted from about 9 a.m. until 1:25 p.m.

The testimony of Hodges establishes during this meeting Hodges presented ten written proposals to the Union, some of which were agreed to. Those proposals agreed to and signed by both Hodges and Kuchirka include a proposal on the payment for jury duty in place of Section 8.8 in the Union's original proposal; a proposal defining normal workweek which is the same as Section 5.1A of the Union's original proposal; a proposal on the recognition clause which is the same as Section 1.1 of the Union's original proposal; a proposal based upon language provided by both Hodges and Kuchirka dealing with conflicts of laws; and a proposal on the grievance procedure which is the same as Section 9.5 of the Union's original proposal.

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[20] According to Hodges the plant is located in prime onion growing country.

A counterproposal offered by Hodges on safety to Article VII of the Union's original proposal was rejected by the Union. Hodges also offered another proposal entitled Article V that payday would be on Friday. However, Hodges acknowledged he and Kuchirka had first agreed payday would be on a Thursday as it presently was, but he subsequently changed his position following the purchase of the Respondent by President Schmidt and stated he informed Kuchirka the reason was this had resulted in a cash flow problem.

Another proposal offered by Hodges dealing with excessive absenteeism and poor punctuality was withdrawn by Hodges after it was objected to by Kuchirka. A counterproposal offered by Hodges on layoff to Article XII of the Union's original proposal was also discussed but no agreement was reached. Further discussed was a counterproposal by Hodges on promotions. However, this was unacceptable to Kuchirka and no agreement was reached.

No other matters was discussed or agreements reached at this meeting.

The seventh negotiation meeting was held on September 1. Although the starting time was not established it ended about 1:35 p.m.

Various proposals presented by Hodges were discussed and agreed to at this meeting and signed by both Hodges and Kuchirka. These included a proposal defining the work day and work week which is the same as Section 5.1B of the Union's original proposal[21] a proposal on funeral leave[22]; a proposal for double time pay on Sunday which is the same as Section 5.4 in

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[21] A portion added to the end of the provision in the Respondent's proposal had been stricken.

[22] The Union, in its original contract proposal, had left a blank section for funeral leave.

the Union's original proposal; and a proposal for double time pay on holidays which is the same as Section 5.5 of the Union's original contract proposal.

A proposal by Hodges dealing with the payment of overtime pay which is the same as Sections 5.3a. and 5.3b. of the Union's original proposal but did not contain overtime for Saturday work as contained under Section 5.3c. of the Union's original proposal was discussed but not agreed to. Also discussed but not agreed to was a proposal by the Respondent on work shifts. While this proposal contains language similar to Section 5.2B of the Union's original proposal, it does not set forth the shift hours as does the Union's proposal.

A proposal by Hodges on night crew premium pay was also discussed but not agreed upon. The Union's original proposal on this matter contained in Section 5.6 was broader in scope.

Hodges informed them at the meeting that in view of Respondent's financial position and record they might wish to use the inability to pay argument and request a five to eight percent overall reduction in wages and fringes.[23]

Hodges also identified at the meeting what he described as those still unresolved economic areas which included agency shop; definition of work week and hours; safety and health; arbitration verses the right to strike; job promotion; transfer; layoff process; no-strike, no-lock out; duration of contract and super seniority.

They scheduled another negotiation meeting for September 15, 1978. According to Hodges it wasn't scheduled earlier because Kuchirka informed him three members on the

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[23] President Schmidt stated it was his idea about reducing wages five to eight percent because the Respondent was losing money. However, they didn't because they were optimistic about the way things were working out.

negotiating committee were going hunting; Kuchirka couldn't meet for two days because of an arbitration case; and Hodges was not available one week.

This meeting scheduled for September 15, 1978 was subsequently rescheduled to September 18, 1978, at the request of Hodges because of a conflict arising out of his being engaged in public sector bargaining which was under a mediator's control.

Hodges testified on September 14, he called Kuchirka and informed him they should begin discussions on economic items at their next meeting and suggested they discuss health and accident insurance, pensions and job classifications.

The eighth negotiation meeting was held on September 18, 1978 and lasted from about 9:30 a.m. until 3 p.m.

This meeting began with a presentation by a representative of Blue-Cross Insurance Company provided by Kuchirka to present the program the Union wanted except for its having a seperate drug plan.

Following the presentation various economic proposals were discussed. Hodges' testimony established he agreed to the Union's proposal on call-in pay which is contained in Section 6.1 of the Union's original proposal.

Also discussed were labor classifications and job grades brought up by the Union; pension plan; prescription glasses; hours of work; Christmas party; certain paid holidays; the Respondent's merit review system; the cost-of-living program used by the Respondent (herein referred to as COLA)[24]; perfect attendance bonus; education program; small loans; picnics, including how they should be paid for; and the apprenticeship program.

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[24] This program had been in effect since about 1974.

They also discussed wages with Kuchirka stating they would hold that subject open until they saw what the Respondent did on fringe benefits.

Regarding the discussion of COLA, Kuchirka indicated he did not like the Respondent's formula for it and would probably offer a counterproposal on that aspect.

The nonpayment for the July 3 holiday was discussed and Hodges also mentioned the Gordon Hyman case.

Hodges further informed them the Respondent might be sold within three weeks or less.

The next meeting was scheduled for September 25, 1978.

The ninth negotiation meeting was held on September 25, 1978 from about 10 a.m. to 12:05 p.m.

Hodges testified he informed them President Schmidt had purchased the Respondent and was in the process of reviewing the entire package of negotiations.

The subject of health and accident insurance was discussed with Hodges informing them the Respondent was looking at its entire insurance program. Hodges indicated they might be able to solve their problems on premium payments for the second and third shifts and mentioned there might be some movement on paying the employees for the July 3 holiday to show good faith towards the employees.

Other economic issues discussed included call back pay; safety prescription glasses[25]; wage classification system; COLA; a need for a Union proposal on the pension plan; weekly disability insurance; paid holidays; and vacation schedule and vacation pay.

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[25] Hodges at one negotiation meeting stated he proposed having OSHA frames instead of fancy frames and prepared an agreement that Respondent would maintain glasses within reasonable limits not to exceed one pair per year.

Tool loans were discussed and Hodges indicated the Respondent had movement on the Union's proposal to make interest free loans available for employees to purchase personal tools for their job.

Wage matters were discussed but not across-the-board type wages.

The Union's proposal to shut down the plant down from December 24 to January 2, was discussed which Hodges said they would consider.

The Respondent's merit review system was discussed with Hodges taking the position they wanted to retain their present system while the Union objected to it and proposed instead some kind of automatic wage progression.

Life insurance was also discussed. Hodges acknowledged during negotiations Kuchirka had informed him the Respondent was paying their present insurance carrier too much and gave him an insurance booklet and a proposal on insurance. Hodges gave the information to the Respondent which then researched it to see if it could increase their insurance coverage for employees at the best cost for the Respondent without increasing the employee cost. According to Hodges during negotiations the Respondent increased its employees' insurance[26] which Hodges acknowledged probably resulted from the Union's request.

This meeting ended with an agreement that Hodges would call Kuchirka on September 29.

On September 29, 1978, Hodges testified during a telephone conversation with Kuchirka they scheduled a definite date for a negotiation meeting to be held on October 20, 1978 with a tentative date set for October 9, 1978. The October 9 date was tentative because Hodges was scheduled to teach a

[26] This increase in insurance coverage was not alleged to be unlawful.

week long seminar which had been scheduled a year previously which he did teach that week. Hodges' proposal to meet on October 16, 1978 was rejected by Kuchirka, who informed him he would be out of town that week.

The tenth negotiation meeting was held on October 20, 1978. It only lasted from about 8 a.m. to 8:30 a.m.

Hodges' testimony establishes this meeting began by Hodges asking Kuchirka about the Union's proposal on the pension plan whereupon Kuchirka informed him it wasn't available but he would let him know when it arrived.

Kuchirka mentioned he had just returned from a trip to Detroit and told Hodges that Hodges was being investigated, accused Hodges of milking the Respondent[27] of money by stringing out negotiations and said he was going to get him. Kuchirka also told Hodges he was tired of him prolonging and stringing out negotiations for a year which Hodges denied saying it had been his experience that the first contract could take three to six months. Hodges informed Kuchirka his remarks were inappropriate and not conducive to creating a good bargaining relationship at the table and he was going to leave.

Hodges then gathered up his materials and as he started to leave Kuchirka asked when he was going to hear from him. Upon informing Kuchirka he would call him Monday, Kuchirka told Hodges not to bother because he would be out of the country.

According to Hodges, he had prepared certain concessions and counterproposals to present at that meeting which he subsequently made at the next meeting.

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[27] Chester Donaldson, a member of the committee, testified he also thought he heard Kuchirka accuse Hodges of milking the Respondent.

On November 3, 1978, the Union filed a charge against the Respondent in Case 33-CA-3970 alleging it had violated Section 8(a)(1) and (5) of the Act by Hodges' failure and refusal to bargain in good faith by cancelling a negotiating session without proper reason and by consistently refusing to meet with the Union at reasonable times for negotiations.[28]

A hearing involving the discharge of Gordon Hyman, originally scheduled for November 28, 1978, was continued on November 29 at the request of the General Counsel to January 11.

According to Hodges, where testimony was corroborated by President Schmidt, during the period from October 20, 1978 through November 27, 1978, he spent time with management preparing for the scheduled November hearing.[29]

The eleventh negotiation meeting was held on November 29, 1978 and lasted from about 9 a.m. until 7:30 or 8 p.m. This was the first negotiation meeting attended by a federal mediator who had been called in by the Union. All subsequent negotiation meetings were also attended by a federal mediator.

The meeting began with the parties reviewing with the mediator what had transpired during negotiations and what items remained on the bargaining table. The testimony of Hodges establishes various items were discussed including vacations; half day off with pay; Christmas party; annual bonus; December 25 and January 1 holidays; attendance checks for

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[28] While President Schmidt contended the unfair labor practice charges filed by the Union hurt the continuity of bargaining he was unable to specify how it did so but presumed it did by making it difficult to keep a person's mind on the issues at the bargaining table.

[29] It was not established this was the reason no negotiation meetings were held.

January 2 resulting from the Respondent's perfect attendance policy; payment for July 3, 1978 holiday and Hodges also mentioned the Gordon Hyman case.

Hodges, as a counterproposal, furnished the Union with a copy of a proposed classification system which incorporated ideas of both the Union and the Respondent and also offered those counterproposals and concessions which he had planned to offer at the October 20 meeting. They were as follows: two paid 10 minute breaks per shift; providing specialized non-standard safety equipment; paying $20 towards the cost of prescription safety glasses with OSHA frames; paid holidays for Christmas Eve Day and New Year's Eve Day; providing non-interest loans to employees to purchase work related tools; using profits from the vending machines for picnics and the flower fund; acceptance of the Union's language on equal pay equal work; COLA with a 25-cent per year cap[30]; increasing life insurance from $4,000 to $5,000 without additional cost to the employees. Hodges also proposed keeping the vacation pay system and the education program the same as they existed under Respondent's present policies.

During this meeting the Union proposed five economic items. They were placing everyone at the top of their rate range; Christmas through New Year's off; keep the perfect attendance bonus; keep the year end bonus; and keep the Christmas party but with some modifications. The latter three programs were already in effect.

While Hodges testified these were additional economic items the Union was requesting the Union had previously requested at the September 25 meeting Christmas through New Year's off and under Article XVII of the Union's original proposal it had listed attendance bonus and year end bonus but without any details.

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[30] The Respondent's existing COLA program did not contain a cap.

The Union's proposal about everyone being placed at the top of their rate range was that any individual employed by Respondent at the time of the agreement would go to the top of their existing labor wage rate. Hodges rejected this proposal taking the position to keep Respondent's present system.

On December 1, 1978, Hodges testified at a meeting held between himself, President Schmidt, and Secretary-Treasurer Schmidt, and General Manager Zeaske, a decision was made to pay the employees holiday pay for July 3, 1978.

The next negotiation meeting was not held until February 7. Hodges' explanation for the delay during which there was no direct oral communication between Kuchirka and Hodges, was that the federal mediator had informed him Kuchirka because of his vacation would not meet in December 1978 when Hodges wanted to meet and during January to early February a meeting could not be arranged because of the unavailability of the federal mediator from January 2 to January 12, a paralyzing snow storm from January 13 through January 20 and because Hodges also had other prior commitments during part of that period.

Kuchirka sent Hodges a letter dated January 8, requesting a negotiation meeting and suggested he felt they didn't have to have a federal mediator present. Hodges responded by letter dated January 10 informing Kuchirka he thought it was in their mutual best interest to continue with a mediator present and indicated the mediator would contact him about setting up the meeting.

Robert Johnston, who is the Union's director of Region 4, wrote President Schmidt a letter dated February 1, requesting regular meetings be held in order that an agreement could be consummated and suggested Kuchirka be contacted and meetings set up for finalizing an agreement. Both President Schmidt and Hodges acknowledged they did not respond to this letter.

The twelfth negotiation meeting was held on February 7. It lasted from about 11 a.m. until 6 p.m. Hodges, without objection by the Union, also had secretarial help present at this and all subsequent negotiation meetings who made a transcript of those portions of the negotiations at which the representatives of both the Respondent and Union were present and engaged in negotiations.[31]

The transcript of this meeting reflects it opened with the mediator suggesting they review where they were to see what they had agreed upon and what was still open. Kuchirka listed as follows the various items of the Union's original proposal which had been agreed upon: Secion 1.1 dealing with recognition and representation; Sections 2.1 and 2.2 dealing with purpose and relationship; Sections 3.1 and 3.2 dealing with nondiscrimination; the first paragraph of Section 4.1 dealing with functions of management; Sections 5.1A, 5.1B, 5.3a. and b., 5.4, 5.5, and 5.7 dealing with hours of work and overtime; Sections 6.1 and 6.3 dealing with reporting and call-in pay; the third paragraph of Section 7.2 dealing with safety, health, and sanitation; Sections 8.1 except that the 45-day period was changed to one year, 8.2, 8.3 with the exception of the last sentence about Peace Corps which they had agreed to scratch, 8.4, 8.5[32], 8.6, 8.7, and 8.8 all dealing with leave of absence; Sections 9.1, 9.1A, 9.2, 9.3A, 9.4, steps one a., two b., and three c. except for the last sentence and step four, 9.5, and 9.6 dealing with the grievance procedure; Sections 11.1, 11.3a., b., c., d., e., and f., and 11.4[33] with the seniority lists to be furnished in

[31] The General Counsel at the hearing disclaimed the presence of secretaries at the negotiation meetings as being an issue.

[32] Hodges disagreed with Kuchirka's claim they had agreed on Section 8.5 whereupon a question mark was placed after it.

[33] According to Hodges they agreed to Section 11.4 at this meeting.

January, April, July, and September all dealing with seniority; Sections 12.8a., 12.10 and 12.11 dealing with job openings, transfers, layoff and recall; the equal pay for equal work provision; and Article XVIII dealing with funeral leave.

Among those sections mentioned by Kuchirka as having already been agreed to the record does not establish when the following sections were actually agreed to: Sections 5.3a. and b. dealing with overtime; Section 6.3 dealing with reporting and call-in pay; the third paragraph of Section 7.2 about maintaining glasses, Sections 8.1, 8.6, 8.7, and 8.8 all dealing with leave of absence, and Section 12.8a dealing with layoffs.

Among those sections listed by Kuchirka as having been agreed upon the following sections were crossed off Hodges' July 19, 1978 master checklist: Sections 8.4 and 8.5; Sections 9.1, 9.1A, 9.3A, 9.4 and Sections 11.1, 11.3a.

Hodges then proceeded to list the unresolved issues. The economic ones were as follows: agency shop; definition of workweek and hours; safety and health committee language; arbitration verses strike-lockout as the last step; job promotion, transfer language; layoff language; language on no-strike, no-lockout; duration of contract; and no-contract, no-strike priority. The unresolved economic issues listed by Hodges covered 44 items including overtime; shift differential; call back pay; safety equipment; grievance pay and scheduling grievances; holiday and vacation pay; insurance; pension; dues checkoff; wages; COLA; bonuses; education program; tools and lockers; picnics; classifications; present benefits; apprenticeship program; merit review system; length of contract; prescription drug and dental plan; safety glasses; and weekly disability increases.

Hodges again indicated there was a possibility during negotiations he might make an inability to pay argument on

behalf of the Respondent but said if he did he was aware he would have to open Respondent's books.[34]

Following a brief discussion about safety glasses the parties then met separately with the mediator.

Later that day they met again. The transcript reflects Kuchirka brought up that Jim Martin, who is a member of the committee, had been denied two days perfect attendance pay because of attending negotiations which Hodges promised to look into and subsequently did. This issue is discussed, *infra.*

The transcript also reflects the mediator informed Hodges the Union would drop its proposal on Section 1.2 dealing with Union security if authorized by state law[35] and the second paragraph of Section 4.1 dealing with functions of management; agree to what the Respondent already had on breaks; and would also agree under Section 6.2 dealing with paying the employees called in to work outside their regular working hours, to reduce their required hours from 4 hours to 3 hours.

Other items discussed included proposals on safety glasses; Section 5.2A dealing with shift hours; Section 7.2 dealing with safety equipment; attendance and Christmas bonuses; COLA; non-interest loans for tools; and lockers and tools.

This meeting ended with the parties agreeing to meet on February 9 at 9 a.m. Hodges promised to give the Union its position then on each of the issues remaining on the bargaining table.

The thirteenth negotiation meeting was held on February 9. It lasted from about 9 a.m. until 4 p.m.

Hodges testified at this meeting he presented various written proposals which he prepared using either his own

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[34] According to Hodges he had discussed this with President Schmidt and Secretary-Treasurer Schmidt on February 5.

[35] Iowa is a right to work state.

language or language from the Union's original proposal. Those proposals agreed to between Hodges and Kuchirka, who both signed them, were as follows: a proposal for non-interest loans to purchase tools; Section 5.2A dealing with shift hours with the exception that the hours in the Union's proposal of 7 a.m. to 3:30 p.m. and 3:30 p.m. to 12 midnight would be from 6 a.m. to 2:30 p.m. and 2:30 p.m. to 11 p.m.; a proposal the Respondent would pay $31 towards purchasing prescription safety glasses; a proposal on lunch period and paid break and wash-up periods in place of Section 5.2B of the Union's original proposal; Section 6.2 regarding call-in pay except for reducing the 4 hours in the Union's original proposal to 3 hours as offered by the Union in the prior meeting; a proposal the Respondent would provide non-standard safety equipment in place of Section 7.2 of the Union's original proposal; and a proposal the Respondent would provide an education incentive allowance.

Hodges stated the Union presented eight to ten new proposals as follows: purpose of job classification; absenteeism by reason of death in the family; vacation pay preamble; Union bulletin board; Union business as time spent; non-member performing bargaining unit work; good faith attitude; and furnishing the Union with pertinent information.

The transcript of the meeting reflects various issues were discussed during the meeting. These included COLA on which the Respondent wanted a cap[36]; a year end bonus considered by the Respondent to be a gift with the Union objecting to the

[36] Hodges stated it had been made clear to him by President Schmidt he had to have a cap on COLA. President Schmidt testified the cap on COLA was proposed because of the accelerating cost of living and as a result of the change of ownership the Respondent no longer had a big bank behind it and was more conscious of total cost.

amount of $50[37] offered by the Respondent; perfect attendance bonus; educational program; profits from the vending machines which the Union wanted used for such things as picnics and parties; providing tool boxes and lockers; job promotions which the Respondent wanted based upon skill and ability rather than seniority; seniority; safety and health language; overtime; and Union business during work. However, no other agreements were reached at this meeting.

This meeting ended with the parties agreeing to meet again on February 16 at 9 a.m.

The fourteenth negotiation meeting was held on February 16 and lasted from about 9:50 a.m. to 11:05 a.m.

Hodges' testimony establishes he provided the Union with an updated wage schedule dated February 5.

Certain written proposals were also provided by Hodges. These proposals, which both Hodges and Kuchirka agreed to and signed, were as follows: a proposal providing in the event an apprenticeship program is established the Respondent will provide non-interest loans to cover the cost of tools, books, slide rule, and related items; a proposal for providing lockers and security of tool boxes; a proposal setting forth the purpose of the contract which was a recent proposal by the Union; a proposal for the Respondent to provide Union bulletin boards which was a recent proposal by the Union; a proposal on absenteeism because of death in the family which was a recent Union proposal; a proposal requiring negotiation of new job title and classification to labor grade which was a recent Union proposal; and a proposal for the Respondent to furnish griev-

[37] Under the Member's Manual the minimum amount of the bonuses was $25.

ance information to the Union which was also a recent Union proposal.[38]

The transcript of the meeting reflects other issues were also discussed. The year end bonus was brought up and Kuchirka mentioned if it was tax free, they were open-minded to the suggestion. The Union's recent proposal on non-members performing bargaining unit work was rejected by Hodges who gave financial reasons and pointed out that managers or supervisors did bargaining work and this provision would not allow them to do it.

Hodges also testified at this meeting Kuchirka criticized him about not talking to President Schmidt who did not know what was going on and accused Hodges of milking Schmidt out of his money by prolonging the negotiations.

Following the February 16 negotiation meeting Hodges and President Schmidt had a meeting that day with the federal mediator at which time they discussed the negotiations.

The fifteenth negotiation meeting was held on February 19. It began sometime that morning and lasted until about 1 p.m., although the parties themselves only met together from 11:50 a.m. until 1 p.m.

Hodges testified at this meeting he furnished the Union with a written document.

This document, which is signed by Hodges, mentions the importance of the Respondent making every concession it can when it is about to make a final offer and lists the following additional concessions the Respondent was making: purpose of

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[38] This latter proposal also contains another provision regarding pay for time spent on grievances which Hodges denied he had agreed to and the transcript on that meeting supports his denial.

job classification; overtime allocation[39]; annual picnic-profits from vending; and Saturday as such.

According to Hodges, when the Union first presented its proposal on job classification and distribution of overtime, he informed them he couldn't live with the language. However, Kuchirka subsequently modified some of their language which was more acceptable.

The document also described the Respondent's recent economic history as including consecutive losses, outstanding bank loans for operating capital requiring repayment and a pessimistic business outlook for 1979 and concluded that for economic reasons, although it specifically denied an inability to pay, to maintain the status quo rather than making changes. It proposed a one year contract only; maintain the present Member's Manual as it was except for the overall loan policy and Christmas party; and incorporate into the manual all economic items and language conceded by the Respondent during negotiations.

This document specified the following items had not been changed during negotiations and would continue to be maintained as they were then in the manual: shift differential; vacations; group insurance; wages; COLA formula, 35-cent cap; year end bonus; attendance bonus; classification structure; holidays-plus the additions during negotiations; merit review system; health and safety language; and job promotion, transfer and lay-off language.

The document further specified it wanted to make clear the Respondent had not conceded to the Union's request on the following items: pay for handling grievances; scheduling and payment of meetings during working hours; pension program;

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[39] Hodges presented a proposal at the meeting on equitable distribution of overtime.

dues checkoff; automatic wage progressions;[40] providing safety shoes; prescription drug plan; dental plan; prescription glasses for family; increase in weekly disability; preferential seniority; no arbitration clause; Union business as time spent; and non-member performing bargaining work.

Hodges at the hearing testified this document which he denied was a final offer, was to indicate where they were at and where they were going in negotiations. However, the transcript of the meeting, which shows the document was discussed in detail, reflects Hodges referred to it as a final proposal and indicated with the changes the manual would become the contract. Hodges also informed them that those items he enumerated should cover the items which was still open at the conclusion of their last meeting.

Hodges testified, and the transcript of the meeting reflects, Kuchirka questioned him about how much notice he needed if the employees wanted to strike. Kuchirka raised this question after remarking there had been no final movement and that was Hodges' final answer.

The transcript of the meeting further reflects Hodges, pursuant to Kuchirka's inquiry, agreed to furnish the Union a week later with a complete package including those things they had agreed to.

They arranged to meet again on Tuesday at 8:30 a.m.

Following this meeting Hodges testified, pursuant to Kuchirka's request, he prepared a document containing the date February 26 which he proposed to the Respondent that it sign as a collective-bargaining agreement.

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[40] President Schmidt testified the Union's proposal on this issue was not defined specifically so there was no position to take.

According to Hodges the language contained in the document, which was never given to or shown to the Union, was taken from proposals which he and Kuchirka had agreed to and signed in negotiations; provisions from the Member's Manual; and from proposals which he stated Kuchirka had given him which he didn't like but could live with. The only examples of the latter source Hodges could identify pertained to a provision on overtime and Section 11.4 of the Union's original proposal under which Hodges proposed giving the Union six copies of the seniority list rather than four copies of only changes on the list which he stated they had agreed to.

Hodges presented this document to President Schmidt and Secretary-Treasurer Schmidt for their approval. However, instead of approving the document they provided Hodges with written modifications dated March 5 and a proposed contract which they testified they were willing to sign. Both President Schmidt and Secretary-Treasurer Schmidt acknowledged they were aware their proposed contract was contrary to agreements which had been reached at the bargaining table.

While Hodges testified he expressed certain disagreements with the Respondent's proposal, Secretary-Treasurer Schmidt claimed they were all in agreement.

The Union was provided with a copy of the Respondent's proposed contract which Secretary-Treasurer Schmidt stated occurred about March 6. This proposed agreement contained provisions taken from the Member's Manual and some but not all of the agreements reached at the bargaining table.

The sixteenth negotiation meeting was held on March 22 and the bargaining portion between the parties themselves lasted from about 10 a.m. to 1:20 p.m.

The transcript of this meeting reflects as follows: Hodges furnished the Union with a copy of the Respondent's insurance program as requested and a list of unresolved issues. Hodges advised it would be extremely difficult to get dues checkoff not

because of cost but as a manner of principle.[41] Hodges suggested if they could draft something on overtime distribution the Respondent would give it consideration.

Hodges mentioned he had informed the Respondent if the Union would concede on everyone of those issues they had a contract but indicated he had no movement.

Kuchirka remarked Hodges had given him a proposal at their last meeting which Hodges no longer had and questioned whether Hodges was the Respondent's spokesman and had the authority to agree to anything. Hodges confirmed he was the spokesman and reminded Kuchirka he had previously informed him the final package was subject to Respondent's approval and his authority was contingent upon the Respondent agreeing to it also.

Kuchirka then questioned Hodges about things which they had agreed to that were not included in Respondent's final proposal. Hodges listed these items as including the equal opportunity clause; size of committee; hours of work; purpose of classification; overtime distribution; length of leave for Union business; Section 11.3d.; seniority list; lay off provision; maintaining safety glasses; Friday payday; and Union business during working hours. Hodges also mentioned the International Union had been left out by an oversight. Hodges disputed Kuchirka's claim they had agreed to a provision about pay for handling grievances.

Upon Kuchirka questioning Hodges about why proposals on job classifications and Saturday as such which he had given him on February 19 were not in the Respondent's proposal

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[41] The Union's dues checkoff proposal which is contained in the original proposal would permit the Respondent to deduct Union membership fees and dues from the pay of employees who executed checkoff authorizations which were irrevocable for one year or the termination of the contract if it occurred sooner.

Hodges informed Kuchirka the work he did was subject to the Respondent finalizing the final document.

Kuchirka also complained about things being included in the agreement which they had not agreed to.

Kuchirka proposed, pursuant to Hodges' inquiry, that it would take the following items to get an agreement: the things they had already agreed to[42]; checkoff; everyone presently working be placed at the top of their rate range[43]; automatic progression wage schedule which would also effect any new employee but indicated the time limits were negotiable; COLA as in the manual and with no cap; each classification to have a job description; complete set of job descriptions and classifications; letter of intent from the Respondent that somewhere down the line there would be a pension system for employees; arbitration; a one year contract; a pregnancy clause which the law required; a letter stating the front page of the Respondent's proposed contract could not be treated as part of the contract; using the word "employees" instead of "members" in the contract; elimination of references to part-time or summer help and Article XXXIV of the Respondent's proposal dealing with conduct; preferential seniority; and pay for grievances which should be resolved during working hours.

Kuchirka assured Hodges he could get such a contract approved.

Hodges then went over the items stating he would inform President Schmidt this was the Union's final position on what it would take to get a one year contract.

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[42] Kuchirka advised Hodges if they didn't get all the things they had agreed to they would have to go to court.

[43] President Schmidt testified the Respondent's position on this item was it would have meant an overall fifteen percent wage increase and their classification terminology was being misinterpreted.

Hodges and Kuchirka then discussed a date for getting the Respondent's answer to its proposal. Kuchirka mentioned he wouldn't be available on March 27 and 28 and they agreed at Hodges' suggestion to meet at 9 a.m. on March 30.

The seventeenth negotiation meeting was held on March 30. It was not established how long this meeting lasted.

Hodges testified prior to the March 30 meeting he prepared a checklist which included those items which he stated he and Kuchirka had previously agreed to at the bargaining table which Respondent's officials indicated they didn't want in the contract.[44] These items were equal opportunity clause; size of committee 5-3; hours of work language; purpose of classification; overtime distribution; length of leave for Union business; justification in Section 11.3d. of the Union's original proposal dealing with seniority; seniority list four times per year; lay off provision-use job skill instead of classification; and maintain safety glasses. While the list also includes Friday as payday Hodges testified he didn't recall having agreed to that with Kuchirka.

There was no testimony presented regarding what transpired at this meeting. However, Hodges wrote Kuchirka a letter dated April 1 stating it was confirming the Respondent's position during the March 30 meeting and that the Respondent conceded the following issues: seniority list four times a year; supply the Union with a copy of each job description; letter of intent on pension program; one year contract; language that conforms to the new law on pregnancy; president's letter will not be part of the contract; the word "employee" used instead of "member"; and Union business should be resolved during normal work hours.

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[44] The checklist also listed other items which, according to Hodges, were still on the bargaining table.

The eighteenth negotiation meeting was held on April 10 and it appears the parties themselves met from about 3:20 p.m. to 4:55 p.m.

Jim Wright, a Union officer also attended this meeting.

The transcript of the meeting reflects there was a discussion of the status of negotiations by Wright and Hodges with Hodges assuring them the Respondent was kept informed of what occurred at the meetings which was one of the reasons for having minutes taken of them.

Kuchirka brought up the list of the Union's demands made on March 22 which they went over. Kuchirka informed Hodges he was not going to ask for any increases in wages or fringe benefits on the basis President Schmidt had just bought the place and couldn't afford it.

Hodges denied he was crying inability to pay, but stated it was not in the best interest to pay fringe benefits at that time.

Kuchirka mentioned there was a federal law on pregnancy and he didn't have to bargain for that.

Kuchirka indicated if they had to strike they would ask for a wage increase and fringe benefits but said they were willing to settle for a one year contract just to keep the peace.

Upon Kuchirka inquiring of Hodges whether he had anything to offer on the Union's March 22 list, Hodges' response was he had furnished Kuchirka with a list of those issues still on the bargaining table.

Hodges than listed the following items which he stated they had agreed upon but which the Respondent, upon seeing his completed document, would not go along with: equal opportunity clause; size of Union committee with the Union wanting 5 members and the Respondent 3; hours of work language; purpose of classification language; overtime distribution; length of leave for Union business; the word justifica-

tion in Section 11.3d.; lay off provision with the Respondent wanting to use job skill rather than job classification; maintaining safety glasses; and Friday payday.

Kuchirka mentioned there were other items which Hodges had not mentioned and weren't in the Respondent's proposed contract but which they had agreed to as well as certain things in the Respondent's proposed contract they hadn't agreed to. The latter group included a sentence under Article IV about the Respondent having the right to increase rates and benefits when possible and/or needed; omitting under step 4 of Section 5.3 dealing with grievances, their agreement about meetings being held at a time mutual selected by the parties which Hodges then said was not a problem; inclusion of step 5 in Section 5.3 dealing with the right to strike and lockout; objection to Section 6.3 dealing with departments having different work hours and posting them; objection to Section 6.8 providing for a Firday payday on the grounds payday had always been on a Thursday and they had previously signed an agreement on it; objection to not including under Section 16.3 legitimate Union business as an allowable exception to perfect attendance and punctuality; the inclusion of provisions under Section 16.4 dealing with discipline for excessive absenteeism or punctuality because it came under separate rules; objection to the second paragraph of Section 17.1 dealing with leave of absence because they had agreed to three months of absence to be renewed in 30 days; the inclusion of a sentence under Section 17.4 limiting the length of leave on the grounds the Union had not agreed to it; objection to word changes made in Section 18.3; objection to Section 18.4 not providing for submitting complete seniority lists as they had agreed upon rather than only changes; the failure to include as they had agreed on February 16 for new job classifications; tool boxes and lockers; objection to inclusion of the safety rule provisions which Kuchirka wanted taken out of the proposed contract; and

inclusion of Article XXXIV dealing with conduct, Article XXXV dealing with part-time members, and Article XXXVI dealing with summer members which Kuchirka wanted out.

Kuchirka also mentioned nothing had changed on insurance and he was not asking for the pregnancy law because the law required it.

Hodges informed them he would back off of the article on contract termination.

Hodges then listed those items which he stated were still on the bargaining table. They were dues checkoff; move all present employees to the top of their rate range; automatic time wage progression schedule; Union wants COLA program as now with no cap; arbitration as the last step of the negotiations; no part-time, no summer help in the contract; do not like the list of rules in the contract; preferential seniority; and compensate committee for Union business and time spent during working hours.

Kuchirka asked Hodges about signing a contract and informed Hodges if he consented to all those items the Union would sign for one year.

There was some discussion of a strike with Wright informing Hodges he wasn't threatening him with a strike.

Kuchirka also told Hodges the next meeting would be their last and Wright stated they were through talking.

Hodges sent Kuchirka a letter dated April 26 informing him final draft of the contract was being typed. The letter further stated its purpose was to indicate those items they had discussed in negotiations which were not in the contract. It listed the following as items which Hodges and Kuchirka had agreed upon but which the Respondent would not concede to be in the agreement: equal opportunity clause; hours of work

language; length of leave for Union business; justification in Section 11.3d.; lay off provision—used job "skill"—not "class"; and Friday as payday.

The letter also listed as not being in Respondent's proposed contract the following items which Hodges testified were those the Union wanted: dues checkoff; move all employees to the top of the range; automatic time-wage progression schedule; will except COLA as now in manual—no cap (.35)[45]; arbitration as last step of grievance procedure; no part-time, no summer help in the contract; do not like list of rules of conduct; preferential seniority; and Union business during working hours with compensation of committee.

The Respondent posted a notice to its employees dated April 27 announcing, in pertinent part, a cost-of-living increase under its COLA program and that the program had meant a 40-cent per hour increase for the past year.[46]

Hodges stated about the beginning of May a proposed contract the Respondent was willing to sign was sent to Kuchirka.[47] The Union received it about May 2 or 3 but no negotiation meeting was held at this time.

This proposed contract, with certain limited exceptions, was essentially the same as the proposal contract previously submitted to the Union by the Respondent. These exceptions

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[45] The 35 cents was the amount of the cap on COLA which the Respondent proposed.

[46] The General Counsel represented at the hearing such evidence was offered solely to show the 35-cent cap which the Respondent proposed on its COLA program would have been lower than the 40 cents they would receive under the existing program.

[47] Both Secretary-Treasurer Schmidt, who testified he prepared it on April 29 and President Schmidt testified they were willing to sign it.

include the absence of President Schmidt's cover letter; changing the word "member" to "employees" in certain articles; increasing under Section 5.2 the number of members of shop committee it would recognize from up to 3 members to up to 5 members; and under Section 23.4 adding a sentence about the Respondent would maintain the prescription safety glasses from the standpoint of normal wear and tear during working hours.

On May 10, the Union filed the charge against the Respondent in the instant case, Case 33-CA-4272.

On May 14, the Union went on strike and the striking employees did not report to work. The strike was still continuing at the time the hearing closed.

Luther Haney, a member of the Union's negotiating committee credibly testified, without denial, that at a Union meeting held on April 29 by Kuchirka and members of the Union's negotiating committee, Kuchirka reviewed with the employees attending what had transpired at negotiations, went over the Respondent's proposed contract, pointed out the differences, and accused the Respondent of not negotiating in good faith. Haney reiterated what Kuchirka told them and following a request by the negotiating committee for a strike vote the employees voted to strike which the committee had recommended.

On May 5, another Union meeting was held to set a date for the strike. Following a discussion of the status of negotiations the employees voted to strike on May 14.

Two members of the Union's negotiating committee, James Martin and Chester Donaldson corroborated Haney's testimony that the membership voted at a Union meeting to go on strike.

On June 1 a petition for issuance of a temporary injunction was filed in the District Court in the State of Iowa by the

Respondent relating to the picketing at Respondent's plant and that same day an order granting a temporary injunction was issued limiting the number of pickets and prohibiting certain types of conduct.

Kuchirka sent Hodges a letter dated July 9 advising him the Union was ready and available to resume bargaining and suggested meeting dates of July 16, 18, and/or 20 or if they were not suitable for Hodges to furnish the Union with acceptable dates.

According to Hodges this was his first contact with the Union since the strike began although he had talked with the federal mediator[48]. President Schmidt testified the Respondent did not initiate any negotiation meetings itself because the atmosphere wasn't good, they had a lot of difficulty with people on the picket line, and had their hands full trying to run the plant. According to him in late June or early July the federal mediator had made several requests about Kuchirka wanting to meet whereupon he instructed Hodges to meet whenever he could and denied knowing of any reasons Hodges could not meet with them.

The ninteenth negotiation meeting was held on July 20. Although the meeting started about 9:30 a.m., it was not established how long it lasted.

The transcript of the meeting establishes Hodges presented the Union with a checklist of the unresolved items which is the same as those contained in Hodges' April 26 letter to Kuchirka and indicated he had nothing to add to this list.

Kuchirka accused Hodges of not bargaining in good faith because Hodges was the spokesman and the Respondent had

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[48] Luther Haney, a member of the Union's negotiating committee, acknowledged that Kuchirka to his knowledge had not requested a meeting before.

not agreed to the things he and Hodges had agreed to at the bargaining table. Hodges denied he had not been bargaining in good faith.

Kuchirka stated they were asking for more money and had to have the people at the top of the wage classification rate.

Hodges, pursuant to Kuchirka's inquiry, assured Kuchirka, Schmidt was willing to agree to everything they had previously agreed to with the exception of those items contained in Section I of the checklist prepared by Hodges[49]. Kuchirka mentioned they had previously agreed on Thursday as payday, which was payday, whereupon Hodges acknowledged they had been paying on Thursday but mentioned there was a cash flow problem which the former owner did not have and this was an economic item and the reason for having Friday.[50]

Pursuant to Kuchirka's inquiry whether Hodges was willing to offer anything other than he had offered at the last meeting, Hodges informed Kuchirka the only area in which he definitely had movement was the cap on COLA. While stating they still wanted a cap on COLA because they were concerned about double digit inflation and building it into something they couldn't control, Hodges proposed raising the cap to 50 cents an hour while maintaining the present COLA program. Hodges also informed them this was the only thing the Respondent had agreed to his making.

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[49] These items were equal opportunity clause; hours of work language; length of leave for Union business; justification of Section 11.3d.; lay off provision—use "skill—not class"; and Friday as payday.

[50] Secretary-Treasurer Schmidt testified the Respondent wanted payday to be on Friday rather than Thursday as it presently is because it was no longer convenient for them to obtain money and this would allow the use of their money for an additional day.

Upon Kuchirka asking Hodges what they were willing to offer across-the-board on wages, Hodges' response was he did not discuss it with the Respondent because it was a new demand.

When Kuchirka mentioned Hodges was offering less than they presently received Hodges' response was he had a right to do this whereupon Kuchirka accused him of not bargaining in good faith by offering less than the people presently received.

They also discussed vacation pay coming up for the strikers.

Kuchirka then presented the Union's demands regarding a contract. These included the Union's language on Article V, dealing with hours of work and overtime; Article VI, dealing with reporting and call-in pay; Article VII, dealing with safety, health and sanitation; a new proposal on showers for all employees and clean-up on company time; Article VIII, dealing with absence; Article IX, dealing with the grievance procedure; Article X, dealing with arbitration which Hodges, pursuant to Kuchirka's inquiry, rejected at that time; Article XI, dealing with seniority, Article XII, dealing with job openings, transfer, recalls, and layoff; Article XIII, dealing with holiday pay; Article XIV, dealing with vacation; group insurance; a pension plan; uniform wages for job classifications; job descriptions for all classifications; funeral leave, which Hodges stated he thought they had; Article XIX which provides protection for all benefits; equal pay for equal work; cost-of-living protection; skilled training; apprenticeship training program; present COLA without cap on it as it was in the manual; a $1 an hour for all employees across the top of the rate now shown by the Respondent; keep the year end bonus; perfect attendance as in the manual modified to have it for personal days off and two days for every three months on system; and a three year contract, Kuchirka represented this was a complete list of the Union's demands but cautioned it could grow or decrease depending on negotiations.

Hodges and Kuchirka then agreed to meet at 9:30 a.m. on July 27 which Hodges represented was the earliest possible time for him. Kuchirka also suggested they meet every day upon resuming.

The twentieth negotiation meeting was held on July 27 and lasted from about 9 a.m. to 11:55 a.m.

The transcript of the meeting reflects Hodges pointed out that unlike other negotiating situations he must constantly check with President Schmidt to see where they wanted to go.

Hodges also questioned Kuchirka about why the Union had added certain items to its demands.

When Kuchirka accused Hodges of giving them less than the employees already had Hodges' response was there were two new paid holidays; increased life insurance; the amount on safety glasses had been upped; allowed Saturdays as they never had; and a new pregnancy leave because of the law.

Hodges and Kuchirka then discussed the Union's demands at the last meeting and compared them to those contained in the Respondent's proposed contract. Hodges informed them the Respondent would not agree to a safety and health committee although the Union offered to reduce the number of representatives on the committee. Under the grievance procedure Hodges proposed the final step for resolving grievances would be right of the membership to strike and Respondent's right to lock them out.[51] However, the Union which wanted arbitration rejected it. Section 5.5 of the Respondent's proposal which prohibited merit evaluations from being the subject of grievances was discussed. The Union objected to it and Hodges agreed to concede to the Union's position. Hodges explained

[51] President Schmidt testified his position on arbitration, which did not change during negotiations, was he opposed it as a matter of principle because they were a small company and they could not subject themselves to a third party decision.

under the grievance procedure, which was objected to by the Union, the grievance committee or party above the first step would punch out and not be paid for handling grievances. Under Article XI dealing with seniority Hodges stated the Respondent had a hangup about the word "justification" in Section 11.3d., while the Union contended it had previously been agreed to. Hodges explained under Section 18.5 of the Respondent's proposal dealing with seniority he wanted sufficient language that skill weighed highly in layoff, promotion and so forth. Article XII of the Union's original proposal dealing with job openings, transfer, layoff and recall was discussed and rejected by Hodges who indicated pursuant to Kurchirka's request he would offer a counterproposal. Group insurance and pension plans were discussed with Hodges mentioning they had increased their life insurance at no cost to employees. Kurchirka requested Hodges to furnish him with the cost of Respondent's benefits which Hodges said he would take to the Respondent. On dues checkoff Hodges proposed on a given date they would allow the committee or a member during non-working time to set up a table where people could pay dues and have a committee submit it to the Union. Hodges further explained President Schmidt had indicated if withholding money for the United Fund and Savings Bonds was inconsistent[52] he would stop withholding it, but Schmidt was not going to deduct money from people's checks and submit it

[52] Union negotiator Luther Haney testified during the negotiations the Union at one point took the position if the Respondent could checkoff for Savings bonds and the United Fund it could checkoff for Union dues which the Union wanted but it had also indicated to the Respondent they could cancel those other type checkoffs if they wouldn't checkoff for Union dues.

to the Union[53]. Wage and job classifications was brought up with Hodges promising to furnish the Union with the existing job descriptions they had at the next meeting. Funeral leave was accepted by the Union. Kuchirka mentioned the $1 an hour wage increase he proposed, which Hodges rejected, was negotiable. Hodges gave as his reason for rejecting the automatic wage provision was because they would stay with the merit review system. Other items discussed included holiday pay; vacations and vacation pay; length of the contract; absenteeism; apprenticeship program; education; and placing the employees at the top of their job classification. They then agreed to meet at 9:30 a.m. on August 3. Kuchirka had proposed meeting Monday and every day afterwards if necessary while Hodges offered to meet Friday, stating he couldn't meet Monday.

The twenty-first negotiation meeting, which was the last one, was held on August 3. It started about 9:45 a.m. and ended about 10:05 a.m. for the parties to caucus with the federal mediator.

Hodges testified he prepared a checklist of those unresolved issues. This checklist listed the following items on which they had agreed to during negotiations but which the Respondent had refused to accept: equal opportunity; hours of work language—issues of compulsory overtime and loss of attendance pay; length of time leave for Union business; justification in Section 11.3d.; lay off provision—use job "skill" not "class"; and Friday as payday.

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[53] President Schmidt stated he was opposed to mandatory dues checkoff because of principle since the employees were not able to get out at will and his position did not change during negotiations. According to Secretary-Treasurer Schmidt, the deductions made by the Respondent for Savings bonds and United Way were voluntary and could be dropped at any time.

The transcript of the meeting reflects Hodges at the meeting agreed to the provisions on equal opportunity; use of the word justification in Section 11.3d. which the Union wanted; and indicated there was no problem with the provision about the length of time for Union business stating he didn't know why he had been listing it and it was off the list.

The checklist also listed as follows the issues that had not been resolved in negotiations: dues checkoff; move all employees to the top of their range; automatic time wage progression schedule; will except COLA as now in the manual—no cap (.50); arbitration as last step of grievance procedure; no part-time—no summer help in the contract; do not like list of rules of conduct; preferential seniority; and payment for Union business during working time.

Hodges also informed them the Respondent would delete the list of rules of conduct from its proposed contract and instead furnish copies to new hires or post it.

The checklist also listed the following as additional items raised by the Union since the strike: agency shop; hours of work; overtime; safety-health committee; showers for all employees; job transfer—promotion—bidding—recall; holiday pay (Christmas shutdown); vacation pay for those on strike[54]; job descriptions; Union vacation plan; group insurance; pension plan; job classification system; protection of all benefits; skill trades and apprentice training program; a $1 per hour above top of the rate; reinstate two discharged people; year end bonus; two paid days off for every three months' work; and length of contract.

Hodges testified instead of his original proposal about no arbitration he proposed inaugurating another step in the grievance procedure called the fact finding process whereby they

[54] The transcript of the July 20 meeting reflects Kuchirka took the position this was not a bargaining issue.

would each pay half the cost and would have an independent fact finder to make an investigation, determination and recommendation on the issues which would not be binding. The transcript of the meeting reflects this was rejected by the Union which wanted arbitration.

The transcript of the meeting reflects Hodges informed Kuchirka the Respondent had not been able to find the job descriptions which he said were old but had no objection to the Union having them if located and suggested drawing up a new set and giving one to the Union.

The length of the contract was discussed with Kuchirka seeking three years and the Respondent one year.[55]

During the meeting money was also discussed with the Union asking for movement, however, no offer was made by the Respondent on this issue.

The meeting ended with Kuchirka asking Hodges for the package he had asked him for and Hodges responded by saying they might as well caucus with the mediator.

No further negotiation meetings have been held by the parties and no collective-bargaining agreement was ever reached between them.

President Schmidt testified during negotiations the Respondent made calculations and prepared estimates about what it would cost the Respondent concerning certain proposed benefits discussed during negotiations. They estimated for two new holidays, increased life insurance, new prescription safety glasses allowance, Saturday overtime, COLA, and the new

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[55] President Schmidt testified the Respondent's position throughout negotiations was for a one year contract because of the unfavorable conditions in the proposed contract and Hodges also stated he had recommended to Schmidt prior to negotiation meetings that the first contract be a one year contract.

pregnancy benefit it would cost approximately $138,470. Estimates were also made for the cost of moving the employees to the top of their classifications and paying people to conduct Union business. However, none of these documents were ever shown to the Union.

C. Unlawful Threats

Luther Haney, a member of the Union's negotiating committee, testified on Friday, May 11, Foreman Hill,[56] who was his foreman, came to his work station and mentioned he had been in a meeting and said the company had heard a rumor they were going on strike Monday and had asked him to pool everyone in the shop and find out if they were going on strike on Monday, May 14. Hill had a list of all their names and asked him if he was going on strike. Upon replying he probably would because he was on the negotiating committee and a Union member, Hill said he was told to tell him if he did go on strike all of his benefits, such as his pay and insurance, would be cancelled and they would assume he did not want his job anymore. I credit Haney's undenied testimony and find on May 11, Foreman Hill threatened Haney that if he engaged in a strike they would assume he no longer wanted his job.

Haney further stated a few minutes later General Manager Zeaske came over to his work station and in his presence asked Foreman Hill if he had told all of his employees. After Hill informed Zeaske he had, Zeaske asked Haney if he was going on strike with the rest of the employees. Upon replying he was, Zeaske asked him if he knew all of his insurance and benefits would be cancelled and said his card would be pulled and they would assume he didn't want his job anymore.

Glenn Logsdon, Jr., another employee, also testified on May 11, General Manager Zeaske told him if there was a strike

[56] Hill did not testify.

on Monday, all benefits would cease and they would assume he no longer wanted his job.

General Manager Zeaske acknowledged talking separately to both Haney and Logsdon[57] on Friday, May 11, but denied telling them they would consider them to have quit if they went on strike. According to Zeaske, he only informed Haney and Logsdon they had heard a rumor of a strike and said they all had a right to strike and a right to work and that the plant would be open Monday.[58]

I credit the testimony of both Haney and Glenn Logsdon, Jr. rather than Zeaske who I discredit and find on May 11, General Manager Zeaske threatened Haney and Logsdon that if they engaged in a strike they would assume they no longer wanted their jobs. Apart from my observations of the witnesses in discrediting Zeaske, his threats were consistent with those made by other supervisors.

Two other employees credibly testified, without denial, that Work Superintendent Joe Eisenberg[59] made similar statements to them on May 11. James Martin, a member of the Union's negotiating committee, testified Eisenberg told employee Ray Lagrange and himself if they didn't come to work on Monday because of the strike they would consider them quit then and all of their benefits at that time would stop including their insurance. Donna Logsdon[60] stated Eisenberg informed

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[57] Zeaske testified another employee, Ray Volk, was present and while he believed Glenn Logsdon, Sr. was also present, Glenn Logsdon, Sr. denied it although he stated Zeaske talked to him that day.

[58] Zeaske stated President Schmidt had informed the foreman in a meeting held that day to inform the employees of this and that Schmidt had also said anyone who went on strike all their company benefits would cease. President Schmidt acknowledged holding such a meeting.

[59] Eisenberg did not testify.

[60] Prior to her marriage to Glenn Logsdon, Jr. on September 28, her last name was Mulvania.

her and lead person Evelyn Long if they went on strike they would lose all their benefits, their vacation paychecks, their insurance and he assumed they didn't want to work there anymore.[61]

D. The Unlawful Refusal to Pay Striking Employees Vacation Benefits

The employees of the Respondent receive vacation pay. This policy as spelled out in its Member's Manual provides their vacation checks will be issued before July 4 and are payable to everyone on the payroll July 1.[62]

The Respondent's practice is to issue vacation paychecks each year before July 4 for everyone on the payroll on July 1. Those employees who are not actually working on July 1 but are on disability or medical leave also receive their vacation pay unless the Respondent determines at that time they will not be returning to work.

Those striking employees who returned to work by July 1 receive their vacation pay while those striking employees who did not return to work by July 1 did not receive their vacation pay.

Secretary-Treasurer Schmidt testified the vacation pay was paid to the employees on June 28 or 29.[63] His reasons as stated at the hearing for not paying it to the striking employees who had not returned to work on July 1 was because they had voluntarily absented themselves from work and the Respondent didn't know if and when they were returning to work. How-

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[61] These statements by Eisenberg were offered by the General Counsel solely for background evidence.

[62] No exceptions are listed in the manual.

[63] No striking employees returned to work between June 28 and July 1.

ever, under cross-examination Schmidt acknowledged he had not contacted any of the strikers about whether they were going to return to work and denied receiving any information they were not going to return to work. His explanation for paying vacation pay to the strikers who had returned to work by July 1 was because they were on the payroll on July 1.

Secretary-Treasurer Schmidt testified vacation pay is determined on July 1 by the amount of tenure between July 1 and the employee's starting date, coupled with their pay rate. He acknowledged if an employee was off work for sickness he would receive full vacation pay without a reduction for the time off work.

Secretary-Treasurer Schmidt stated the reason the vacation policy is administered this way was is to keep good people working.

E. Additional Background Evidence

The General Counsel, for purposes of background evidence only, proferred evidence concerning an unlawful no-solicitation rule; the denial of holiday pay for July 3, 1978; the failure to pay perfect attendance pay to Union negotiator James Martin; and the discriminatory discharge of Gordon Hyman.[64]

The following no-solicitation rule was contained in the Respondent's Member's Manual:

> Solicitation is considered a nusiance. Activities such as this are prohibited during working hours and on company

[64] On January 11, a settlement agreement in Cases 33-CA-3605 and 33-CA-3811 which involved the no-solicitation rule, discharge of Gordon Hyman, and nonpayment of holiday pay for July 3, 1978 was approved and following compliance with its terms the Consolidated Complaint in those cases was dismissed.

> premises. Members are not allowed to solicit other members. Outside solicitors are not permitted. Unauthorized bulletin board postings are not permitted.

This rule was rescinded on January 11.

The employees were informed by a posted written notice dated April 6, 1978 and signed by President Schmidt that both July 3 and 4 would be paid holidays.

However, a subsequent written notice dated June 28, 1978, posted by the Respondent announcing that the shop would be closed July 3 and 4, 1978 only stated July 4 would be a paid holiday.

The Union, which had been certified on May 22, 1978 as the bargaining representative of Respondent's unit employees was not consulted in advance about the change.

Hodges acknowledged informing the Union at the first negotiation meeting held on June 30, 1978 and at subsequent negotiation meetings that July 3 would not be celebrated as a holiday without pay to which the Union objected.

While the employees were paid holiday pay for July 4, 1978 that same week they were not paid holiday pay for July 3, 1978 until December 1978 at which time as discussed, *supra,* the decision was made to pay them which was after the Union had filed its charge in Case 33-CA-3811 on July 7, 1978.

The Respondent has a program which provides pay to those employees having perfect attendance and punctuality during a calendar quarter. This program, as set forth in its Member's Manual, provides as follows:

> Members with perfect attendance and punctuality during a calendar quarter will be rewarded with 2-8 hour days' pay. New members who qualify will receive an adjusted pay.
>
> The pay may be collected when earned. The pay (up to 8 days) may be collected at a later date. 2 personal days off

with pay may be taken in the following quarter. These days may be taken off without pay if the pay has been previously collected.

The allowable exceptions to this perfect attendance and punctuality pay as set forth in the manual are as follows: funeral leave; jury duty; RR train blocking front access to the plant; severe weather; 2 personal days off earned the previous quarter; and Workman's Compensation case.[65]

Negotiating time was admittedly not an allowable exception by the Respondent to this policy.

James Martin, a member of the Union's negotiating committee, testified during the second quarter of 1978 which was from April 1 through June 30, he had perfect attendance at work except for those occasions he missed work because of negotiations. About two days after the perfect attendance pay was due he asked Personnel Director Anderson[66] about getting his perfect attendance pay. She informed him he wasn't getting it because he wasn't on the job even though he told her the reason was because he had been on negotiations. Martin also denied receiving perfect attendance pay for the quarter July 1 through September 30, 1978 although the only time he missed work then was because of negotiations.

Martin's claim regarding loss of perfect attendance pay was first raised at the February 7 negotiation meeting.

Under cross-examination Martin acknowledged when negotiation meetings only lasted a half day he would take the rest of those days off work.

Gordon Hyman was employed by Respondent as a tool grinder from May 1977 until his discharge on February 24, 1978.

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[65] Secretary-Treasurer Schmidt testified the reason for the policy is to keep good people working.

[66] Anderson did not testify.

His union activities included attending Union meetings, soliciting employees to sign Union authorization cards, signing a Union authorization card himself, serving as chairman of the in-plant organizing committee, and distributing Union literature at the plant.

Hyman testified on February 17, 1978, Work Superintendent Eisenberg accused him of violating the no-solicitation rule by soliciting on company premises and warned him he was walking on very thin lines and there was a possibility of losing his job for soliciting on company premises. Eisenberg also defined company time to include from the time he rang in in the morning until he rang out in the evening to go home.

Hyman stated about February 20, 1978, while passing out Union literature to other employees his foreman, Alex Rosha, and Work Superintendent Eisenberg questioned them about what they were doing and asked if they were going to sign authorization cards.

On February 22, 1978, Hyman testified Personnel Director Anderson questioned him about why he wanted him to help the Union organize, informed him the company could not afford a union and asked him whether he realized he was walking on very thin lines by his violations of the Member's Manual.

Neither Rosha, who resigned from the Respondent in December 1978, Anderson or Eisenberg testified, and I credit Hyman's undisputed testimony regarding these incidents.

On the morning of February 24, 1978, Hyman, accompanied by two other employees Chuck Walker and Doug Wilson[67] went to the office to discuss with Secretary-Treasurer Schmidt an improperly sharpened drill bit. Hyman credibly testified without denial, he had gotten permission from his

[67] Neither Walker nor Wilson testified.

foreman Rosha and permission from Foreman Hill,[68] who was the supervisor of Chuck Walker and Doug Wilson to talk to Schmidt.

During the conversation with Secretary-Treasurer Schmidt at which Hodges was present, Hyman testified both Schmidt and Hodges talked rapidly and he couldn't understand everything they said. However he stated Hodges, who he had never met before, identified himself as a lawyer with the company and the United States Government. Hodges also told him to pick his words carefully and that Hyman knew he was walking on very thin lines as to his violation of the no-solicitation on company time and premises. Upon asking Hodges whether he was charging him with violating company time or premises, Hodges replied on company time. Schmidt also told him to pick his words very carefully and said he was walking on very thin lines. Hodges asked them didn't they realize the company would go broke if the Union came in and said it had been a non-profit company for the past three years. Hodges and Schmidt again mentioned to Hyman he was walking on thin lines for this violation and said he was going to be losing his job if he continued breaking the no-solicitation rule.

Hyman stated he raised his hands and told them he would rather drop the whole thing then because he honestly felt he was not capable of competing against a lawyer and repeated his statement. Hodges responded by using profanity and told Hyman to get out of there and get back to work and said he had already violated one rule in the Member's Manual and for him not to make the situation worse and get himself fired.

Secretary-Treasurer Schmidt denied there was any discussion of the Union or the no-solication rule during the conversation. According to him the only things Hodges said was he was an attorney and at the end of the conversation using

[68] Neither Rosha nor Hill testified.

profanity, told Hyman to get back to work. Although Hodges testified he did not testify about this meeting, I credit the testimony of Hyman rather than Secretary-Treasurer Schmidt. Besides my observations of the witnesses the threats made to Hyman on that occasion were consistent with prior threats made by other supervisory personnel to Hyman and in view of the failure of Hodges who testified on other matters, to corroborate Schmidt's testimony.

Secretary-Treasurer Schmidt stated shortly after this meeting ended Foreman Rosha came to the office inquiring about the whereabouts of Hyman, Walker and Wilson whereupon he informed Rosha they had been in a meeting with him. Upon asking Rosha whether Hyman had asked his permission about going to the meeting Rosha denied it. According to Schmidt, he instructed Hyman to check with his foreman before coming up to see him.

Schmidt stated he then conferred with Foreman Rosha, Work Superintendent Eisenberg, Hodges and President Schmidt and he himself made the decision to discharge Hyman.

Hyman credibly testified that afternoon Foreman Rosha called him to the office where Work Superintendent Eisenberg was present. They gave him his check and Rosha told him there was no more use for his working there or something to that effect. Upon asking Eisenberg the reason Eisenberg informed him they couldn't make him happy there anymore which he denied. When Rosha started telling him he had been spending too much time with fellow employees, Eisenberg interrupted and, using profanity, informed Eisenberg they didn't have to tell him anything because he had his paycheck and all he had to do is leave.

Hyman left.

According to Hyman on February 17, 1978, Secretary-Treasurer Schmidt had informed him pursuant to his inquiry

that with Foreman Rosha's report and his work record and performance he saw no reason why Hyman shouldn't be getting his raise. Although Schmidt denied making such statements he acknowledged in January 1978, informing Hyman his record had been good and he was confident he could do the work.

F. Analysis and Conclusions

The General Counsel contends the Respondent violated Sections 8(a)(1), (3), and (5) of the Act as alleged by unlawfully threatening employees for engaging in a strike, refused to pay certain striking employees their vacation benefits, and refused to bargain in good faith with the Union and that the strike was an unfair labor practice strike. The Respondent denies having violated the Act or that the strike was an unfair labor practice strike.

Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act. Section 8(a)(3) of the Act provides in pertinent part: "It shall be an unfair labor practice for an employer ... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: ...." Section 8(a)(5) of the Act prohibits an employer from refusing to bargain collectively with the representatives of its employees.

The background evidence proferred by the General Counsel clearly establishes union animus on the part of the Respondent.[69]

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[69] Although the General Counsel in his brief alleges unlawful polling of employees was conducted this was not alleged in the Amended Complaints and was not included among those matters he defined at the hearing were being offered for background purposes. Accordingly, this issue was not fully litigated and no finding will be made.

The no-solicitation rule, which was in effect until January 11, prohibits solicitation during working hours which was defined by Work Superintendent Eisenberg in enforcing the rule against Gordon Hyman to mean from the time an employee rings in in the morning until that employee rings out in the evening to go home. Such no-solicitation rules infringe upon the rights of employees to solicit on their own time and are unlawful. *Essex International, Inc.*, 211 NLRB 749, 750 (1974). Accordingly, the Respondent's no-solicitation rule which was maintained and enforced was unlawful. Gordon Hyman's discharge occurred shortly after he had been threatened with discharge by Work Superintendent Eisenberg, Personnel Director Anderson, Hodges and Secretary-Treasurer Schmidt for having violated this unlawful no-solicitation rule. Secretary-Treasurer Schmidt's contention Hyman was discharged for not getting Foreman Rosha's permission as instructed to meet with him the day he was discharged was refuted by the undisputed and credible evidence Hyman had obtained such permission and by Foreman Rosha informing Hyman upon discharging him that the reason was because they couldn't make him happy there. Under these circumstances, including the enforcement of the no-solicitation rule against Hyman; the threats to discharge Hyman for violating the rule; the timing of his discharge in relation to such threats; and having rejected Respondent's defense, I am persuaded and find Hyman was discharged on February 24, 1978 for violating the unlawful no-solicitation rule and therefore his discharge was unlawful under the Act.

The Respondent by eliminating July 3 as a paid holiday after it had previously been announced to the unit employees without first notifying or bargaining with the Union which had since been certified as the collective-bargaining representative of the unit employees unilaterally changed the unit employees' wages and working conditions and thereby violated the Act. The law is well settled that unilateral changes in terms and

conditions of employment without bargaining with the union representing such employees violates Section 8(a)(5) of the Act. *Armsterdam Printing and Litho Corp.*, 223 NLRB 370, 372 (1976); and *N.L.R.B.* v. *Katz et al.*, 369 U.S. 736 (1962).

Insofar as the refusal to pay James Martin his perfect attendance pay is concerned I do not find the evidence sufficient to prove it was because he missed work solely for the purpose of attending negotiations. The only negotiation meeting held in the second quarter of 1978 was on June 30, 1978 and that meeting only lasted an hour and occurred outside work hours. During the third quarter of 1978 a number of the negotiation meetings only lasted about a half a day and Martin by his own admission would not work the remainder of those days without any showing it was related to bargaining or that he had permission to be off work the remainder of those particular days. Under these circumstances I do not find the principle set forth in *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 380 U.S. 26 (1967) applicable.

The findings, *supra*, with respect to the threats to employees about striking and denying certain strikers their vacation pay, establishes on May 11 Foreman Hill threatened Luther Haney that if he engaged in a strike they would assume he no longer wanted his job and General Manager Zeaske threatened Luther Haney and Glenn Logsdon, Jr. that if they engaged in a strike they would assume the employees no longer wanted their jobs.

The test applied in determining whether a violation of Section 8(a)(1) of the Act has occurred is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of the employee rights under the Act." *Electrical Fittings Corporation, a Subsidiary of I-T-E Imperial Corporation*, 216 NLRB 1076 (1975).

The fact employees may elect to go on strike can not be equated to their quitting their jobs. Therefore, applying the

above test I find the Respondent, by engaging in such conduct enumerated, has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act and has thereby violated Section 8(a)(1) of the Act.

The Respondent refused to pay those striking employees who had not returned to work on July 1 their vacation pay.

While the Respondent contends the reason was because the Member's Manual required they had to be on the payroll on July 1, such reason is contrary to its practice of permitting those employees on disability and medical leave on July 1 to receive their vacation pay unless the Respondent determines they will not be returning to work. Here there was no evidence any of the striking employees who were denied their vacation pay had informed the Respondent they would not be returning to work. Rather, the Respondent, as herein found had unlawfully threatened employees if they went on strike they would assume the employees no longer wanted their jobs and employees had also been informed if they went on strike all of their benefits would cease. Based upon such evidence, including the unlawful threats, Respondent's union animus established by its unlawful conduct herein found, and having rejected Respondent's defense, I am persuaded and find the reason the Respondent refused to pay the striking employees who had not returned to work on July 1 their vacation pay was because of their participation in the Union strike and the Respondent thereby violated Section 8(a)(3) and (1) of the Act.

The next issue to be resolved is whether the Respondent refused to bargain in good faith with the Union.

Section 8(d) of the Act defines the duty to bargain collectively as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . ."

This obligation does not compel either party to agree to a proposal or to make a concession. *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952).

The essential element in the bargaining principle is the serious intent of the parties to reach a common ground. *Romo Paper Products Corp.*, 220 NLRB 519 (1975).

A determination of whether a respondent has met the good faith bargaining standard requires consideration of the totality of respondent's conduct. *M. R. & R. Trucking Company,* 178 NLRB 167 (1969), enf'd. in part 434 F. 2d 689 (C.A. 5, 1970); and *N.L.R.B* v. *Insurance Agents' International Union, AFL-CIO (Prudential Insurance Company of America),* 361 U.S. 477, 498 (1960).

The evidence, *supra,* establishes 21 negotiation meetings were held over a period of approximately thirteen months without a contract being reached.

During the 18 negotiation meetings held prior to the May 14 strike the Union and Hodges, who served as the sole negotiator for the Respondent throughout negotiations, agreed to various contract proposals which were subsequently rescinded[70] by Respondent's officials without any valid explanation being given to the Union. This action occurred notwithstanding the Union had been assured repeatedly by Respondent's President Schmidt, without any limitations, that Hodges was its authorized negotiator and Hodges throughout negotiations had kept Respondent's officials apprised of what transpired at negotiations without their having taken any action to disavow such proposals when they were entered into.

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[70] Included among these items were the equal opportunity clause; length of leave for the Union business; the use of the word justification in Section 11.3d.; lay off provision; payday; and hours of work language. Although the first three items were subsequently agreed to again by Hodges at the August 3 negotiation meeting, the other items never were.

Although an employer is not required to be represented by an individual possessing final authority to enter into an agreement this is subject to a limitation that it does not act to inhibit the progress of negotiations. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 1780 (Office and Professional Employees Union, Local No. 445 AFL-CIO)*, 244 NLRB No. 26 (1979). The degree of authority possessed by the negotiator is a factor which may be considered in determining good faith bargaining. *Lloyd A. Fry Roofing Company* v. *N.L.R.B.*, 216 F. 2d 273, 275 (C.A. 9, 1954).

Here the Respondent by allowing its sole negotiator to agree to contract proposals over a prolonged period of the negotiations of which it was aware at the time and then later rescind them under the circumstances presented here only served to disrupt and impede the bargaining process. Therefore, I find Respondent's failure to vest its sole negotiator with sufficient authority to conduct negotiations and by rescinding contract proposals previously agreed to constitutes evidence of bad faith bargaining by the Respondent.

The Respondent denied the Union's proposal on dues checkoff and its position remained adamant throughout negotiations. The only reasons Hodges gave the Union were it was a matter of principle and President Schmidt was not going to deduct money from people's checks and submit it to the Union. Schmidt, who acknowledged his position on dues checkoff remained unchanged throughout negotiations, claimed he was opposed to it on principle because employees were not able to get out at will. However, while under the Union's proposal authorizations were irrevocable for one year or upon the termination of the contract if sooner, dues would only be deducted for those employees who voluntarily signed such authorizations. Since dues checkoff could only be authorized voluntarily and Respondent maintained payroll deductions from employees' pay for Savings Bonds and the United Fund where they had authorized such deductions, I am not persuaded by Schmidt's reasoning for refusing to allow dues deductions.

To have a fixed intent not to reach an agreement on dues checkoff is unlawful. *Hospitality Motor Inn, Inc.*, 249 NLRB 145 (1980). Based upon the foregoing evidence, when considered in light of the other unlawful conduct herein found, I find the Respondent had a predetermined intention which existed throughout negotiations not to reach an agreement with the Union on dues checkoff which demonstrates bad faith bargaining. However, I do not find the refusal to agree to the dues checkoff provision itself constitutes bad faith bargaining.

The Union in its original proposal proposed binding arbitration to resolve these grievances which could not be settled through the grievance procedure. Its position on this issue remained unchanged throughout negotiations. The Respondent rejected this proposal and proposed instead the final step of the grievance procedure would be the right of the membership to strike and the Respondent's right to lock them out. Upon the Union's rejection of this proposal Hodges offered another proposal, which the Union likewise rejected, that a fact finding step be included in the grievance procedure whereby each party would pay half the cost for an independent fact finder to make an investigation, determination and recommendation on the issues but which would not be binding.

President Schmidt, who acknowledged his position remained unchanged throughout negotiations on this issue, claimed he objected to arbitration as a matter of principle because they were a small company and couldn't subject themselves to a third party decision.

Since the evidence establishes arbitration was discussed, counterproposals were offered and agreement was reached on various provisions of the grievance procedure I do not find Respondent's refusal to agree to arbitration as a final step of the grievance procedure itself constitutes bad faith bargaining as alleged.

Only 21 negotiation meetings were held during the period June 30, 1978 through August 3 and the length of those meetings varied. The dates for holding the June 30, 1978, August 4 and 11, 1978, September 25, 1978, and February 9 and 16 meetings were agreed upon by the parties without any earlier meeting dates being requested. It was not established how the July 5, 1978, February 19, March 22 and April 10 meeting dates were selected. The July 19, 1978 meeting date was selected after both Hodges and Kuchirka were unable to meet on the dates suggested by each other. The August 28, 1978 meeting date was agreed upon by the parties after Hodges requested a week to prepare the Respondent's position. The delay for the September 18, 1978 meeting date was at the request of the Union for its negotiation committee members to go hunting and two days for Kuchirka to attend an arbitration case, and a request by Hodges for eight days which included three days for public sector bargaining under a mediator. The October 20, 1978 meeting date was selected because Hodges needed a week to teach a previously scheduled seminar and Kuchirka planned to be out of town for a week. The November 29, 1978, meeting date was arranged after Kuchirka had informed Hodges he would be out of the country. The delay in scheduling the February 7 meeting was due to the federal mediator informing Hodges that Kuchirka couldn't meet in December 1978 because of his vacation and because in January and early February either the federal mediator, who had been called in by the Union and preferred by Hodges to be present, was unavailable, weather conditions involving a paralyzing snow storm, or prior commitments by Hodges. The March 30 meeting date was selected after Kuchirka indicated he wouldn't be available two days. The July 20 meeting date suggested by Kuchirka was the first request by the Union for a meeting after the strike began. The July 27 meeting date was the earliest date Hodges could meet and Kuchirka requested they begin meeting

every day at their next meeting. The August 3 meeting date was agreed upon after Hodges was unable to meet on the Monday requested by Hodges.

Such evidence establishes the delays in scheduling negotiation meetings were attributable to the unavailability of both Hodges and the Union's negotiators without any showing their requests for the delays were for the purpose of delaying bargaining. For these reasons and absent as here any evidence showing the Union pushed for more frequent meetings throughout the course of negotiations, except for the last two meetings, I am persuaded and find there is insufficient evidence to establish the Respondent engaged in unwarranted and unreasonably delays in the scheduling and holding of bargaining meetings as alleged. Insofar as the lengths of such meetings are concerned there was no showing of any demands being made to extend the lengths of such meetings on these occasions.

The evidence, *supra,* establishes the Union presented the Respondent with a complete contract proposal, except for certain economic demands, at the first negotiation meeting and up until the time of the strike supplemented it with various proposals including a three year contract; insurance plan, plant shutdown from December 24 to January 2; automatic wage progression; placing employees at the top of their rate range; keeping the Respondent's perfect attendance bonus and year end bonus; keeping the Respondent's Christmas party with some modifications; job classification; absenteeism by reason of death in family; vacation pay preamble; Union business as time spent; non-members performing unit work; good faith attitude; furnishing the Union pertinent information; profits from vending machines to be used for picnics and parties; COLA as it was in the Member's Manual without a cap; job descriptions for each classification; complete set of job descriptions and classifications; pension system; arbitration; pregnancy clause required by law; letter stating the front page of Respondent's proposed

contract, which was a letter from President Schmidt, could not be treated as part of the contract; use of word "employee" instead of "member"; elimination of reference to part time or summer help in Respondent's proposed contract; elimination of the article dealing with conduct in Respondent's proposed contract; preferential seniority; and pay for grievances which should be resolved during work hours.

The Respondent during this same period agreed to various Union proposals including purpose and relationship; non-discrimination; leave of absence for pregnancy and military service; recognition of shop committee; certain seniority provisions; furnishing names to new employees; pyramiding of overtime and/or premium rates; defining leave of absence; leave of absence for Union business and holding office; defining grievances; Union's right to inspect records for investigating grievances; permission to leave job to discuss grievances; certain provisions of the grievance procedure; defining seniority; termination of seniority and employment; Respondent's right to manage the business and direct the work force; notification regarding reasons for suspension and discharge and the procedure; recognition; defining workday and workweek; double time pay on Sunday and for holidays; call in pay; purpose of contract; provide Union bulletin board; absenteeism because of death in the family; negotiation of new job title and classification to labor grade; and furnishing grievance information to the Union.

Respondent's own proposals agreed to by the Union during this period included who the agreement was between; defining term employee; clarifying the use of "he" to include "she"; certain steps of the grievance procedure; certain seniority provisions dealing with probationary employees and maintaining a seniority list; a proposal on job openings, lay off, and recall; jury duty; conflicts of law; funeral leave; non-interest loans to purchase work related tools; shift hours; paying $21

towards the purchase of prescription safety glasses; lunch periods and breaks and wash-up periods; providing specialized non-standard safety equipment; providing education incentive allowance; providing non-interest loans for such things as tools if an apprenticeship program is established; providing lockers and security of tool boxes.

Other proposals offered by the Respondent during this period were on a one year contract; safety; Friday payday; excessive absenteeism and poor punctuality; lay off; promotions; overtime pay; work shifts; night crew premium pay; classification system; $50 year end bonus; and maintaining the Member's Manual except for the overall loan policy and Christmas party and incorporating those economic items and language conceded in negotiations.

Concessions offered by the Respondent during this same period included two paid holidays; use of vending machine profits for picnics and flower fund; acceptance of the Union's language on equal pay equal work; COLA with a 35-cent cap increased life insurance from $4,000 to $5,000 without additional cost to the employees; keep the vacation pay system and the education program intact; purpose of job classification; overtime allocation; Saturday as such; furnishing seniority list four times a year; supplying the Union with job descriptions; letter of intent on pension program; language to conform to pregnancy law; President Schmidt's cover letter not to be part of contract; use word "employees" instead of "members", Union business should be resolved during normal work hours; and increase size of shop committee up to five members.

Some of those provisions agreed to by the Respondent were rescinded as noted previously.

The Union proposed as concessions to drop its proposal on Union security and part of the proposal on functions of management; accept a one year contract; and not ask for any increase in wages or fringe benefits.

Upon considering both these items agreed upon as well as those proposed, such evidence establishes that prior to the strike notwithstanding the Union offered substantial concessions by offering to agree to a one year contract without any increases in wages or fringe benefits the Respondent offered only minimal non-economic and economic concessions and those concessions were more than an offset by its proposing a cap, which had not previously existed, on its existing COLA program. Rather, the Respondent's proposal for a contract was, with limited exceptions, particularly on substantive matters, essentially the same as the wages, hours, and working conditions contained in the Member's Manual.

For example, the economic increases offered were limited to such benefits as two additional paid holidays; increasing the minimum year end bonus from $25 to $50; raising the allowance for prescription safety glasses to $31; increasing the insurance coverage; paying time and one-half for Saturday work; funding certain educational expenses; and providing non-interest bearing loans for purchasing tools and equipment.

Further, subsequent to the strike while the Respondent agreed to some but not all of those proposals it had previously rescinded, it limited its own proposals to raising the proposed cap on COLA to 50 cents; deleting the rules of conduct from its proposed contract; allowing merit evaluations to be the subject of grievances; furnishing existing job descriptions; and setting up a table at the plant for a Union committeeman to collect Union dues.

Based upon the foregoing evidence I find the Respondent offered only minimal concessions to the Union on both non-economic and economic demands under circumstances further evidencing bad faith bargaining on the part of the Respondent. However, I do not find that by insisting upon a cap on COLA itself was evidence of bad faith bargaining as alleged.

The evidence also establishes throughout negotiations Hodges made statements to the Union's negotiators about the plant being liquidated or closed, possibly withholding the COLA raise due in August 1978 because of financed conditions, and possibly raising an inability to pay argument and requesting a 5 to 8 percent overall reduction in wages and fringes because of financial conditions, without any such action occurring. While the Respondent had lost money in 1976 and in 1978 no foundation for such threats as actually liquidating or closing the plant was established and I am persuaded they constitute further evidence of bad faith bargaining on Respondent's part.

The evidence also establishes the Respondent, while agreeing to certain of the Union's proposals, only submitted approximately 19 proposals of its own all on single items during the first 10 bargaining sessions and it was not until about eight months later in March before the bulk of its own proposals which consisted primarily of those provisions contained on its Member's Manual were submitted. I find such delay in presenting its own bargaining proposals was further evidence of Respondent's bad faith bargaining.

Having found as evidence of bad faith bargaining Respondent failed to vest its sole negotiator with sufficient authority to conduct negotiations; rescinded contract proposals previously agreed to; possessed a predetermined intention which existed throughout negotiations not to reach an agreement with the Union on dues checkoff; offered only minimal concessions on both non-economic and economic demands; made unfounded threats of plant liquidation or closure to the Union's negotiators; delayed in submitting its own bargaining proposals; and additionally, that Respondent engaged in concurrent unfair labor practices away from the bargaining table by maintaining and enforcing an unlawful no-solicitation rule, made unilateral changes by eliminating July 3 as a paid holiday, threatened employees if they went on strike, and

refused to pay certain strikers their vacation pay, as well as its union animus as herein found, I find the Respondent, both before and after the strike, refused to bargain in good faith with the Union and thereby violated Sections 8(a)(5) and (1) of the Act.

The Respondent at the hearing raised as a defense that it was the Union which failed to bargain in good faith and therefore precludes finding a violation against the Respondent. It argues in its brief the Union refused to bargain in good faith by bargaining to an impasse on a non-mandatory subject of bargaining about excluding part-time employees from the unit; repeatedly filed frivilous unfair labor practice charges; repeatedly threatened Hodges; increased its demands particularly after the strike; insisted on sticking to its original proposal; failed to provide counterproposals; and failed to provide Respondent's package to its membership at the time of the strike vote.

An examination of the evidence pertaining to these issues refutes such a defense. There is no evidence any impasse was ever reached during negotiations. Not only does a union have a statutory right to file charges but there is no showing any of the charges filed here were frivilous. Although the threats made to Hodges reflect unfavorably upon Kuchirka's conduct they were not of such a nature as the record reflects by a continuation of the bargaining process to adversely effect negotiations. The Union's increased demands after the strike had been threatened prior to the strike should the Respondent refuse, as it did, the Union's proposals for a contract and under such circumstances, could not constitute evidence of bad faith. The Union agreed to many of the Respondent's proposals as opposed to insisting upon its original proposal and offered counterproposals throughout negotiations. Lastly, there was no requirement that the Union submit the Respondent's proposed contract to its membership at the time of the strike vote, especially in view of the Respondent's bad faith bargaining.

The remaining issue is whether the strike was an unfair labor practice strike. The standard applied in determining whether a strike is an unfair labor practice strike is whether it is one caused "in whole or in part" by an unfair labor practice. *Citizens National Bank of Willmar*, 245 NLRB No. 46 (1979).

Here the employees voted on April 29 to strike after being informed of what had transpired during negotiations and having found the Respondent had engaged in bad faith bargaining both before and after the strike vote was taken, I find the strike was caused and prolonged by Respondent's unfair labor practices herein found and was an unfair labor practice strike.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III above, found to constitute unfair labor practices occurring in connection with operations of the Respondent described in section I above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. Rockingham Machine—Lunex Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW) and the International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW), Local 2077 are each labor organizations within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees including warehouse and shipping employees, truck drivers, janitors and leadmen employed at the Employer's Pleasant Valley, Iowa facility; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union has been and is now the exclusive representative of all the employees in the aforesaid appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By threatening employees that if they engage in a strike they would assume the employees no longer wanted their jobs, Respondent has interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act and has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

6. By refusing to pay the striking employees who had not returned to work on July 1, 1979 their vacation pay because of their participation in the Union strike, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

7. By refusing to bargain in good faith with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

8. The strike which began on May 14, 1979, having been caused and prolonged by Respondent's unfair labor practices, is an unfair labor practice strike.

9. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act, I shall recommend that it cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

Accordingly, the Respondent shall be ordered to pay vacation pay to those striking employees who had not returned to work on July 1, 1979, with interest from the date vacation pay was paid to the other employees about June 28 or 29, 1979.

Having found the Respondent did not bargain in good faith, it shall be ordered to bargain collectively with the Union in good faith with respect to rates of pay, wages, hours of employment and other terms and conditions of employment of the unit employees and embody in a signed agreement any understanding reached.

Further, since the May 14, 1979 strike was an unfair labor practice strike, the Respondent shall be ordered to reinstate those strikers upon their unconditional application for reinstatement and make whole for any loss of earnings the strikers who have made themselves available for employment on an unconditional basis but who were refused reinstatement, with interest.

Backpay and interest as herein provided for shall be computed in the manner prescribed by *F. W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[71]

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining representative for the period provided by law the initial period of certification shall be construed as beginning on the date

[71] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Glomac Plastics, Inc.*, 234 NLRB 1309 (1978), enf'd. 600 F. 2d 3 (C.A. 2, 1979), *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F. 2d 600 C.A. 5, 1964), cert.denied 379 U.S. 817 (1964); and *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F. 2d 57 (C.A. 10, 1965).

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[72]

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[72] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Rockingham Machine—Lunex Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees that if they engage in a strike they will assume the employees no longer want their jobs.

(b) Refusing to pay striking employees who had not returned to work on July 1, 1979 their vacation pay because of their participation in the Union strike.

(c) Refusing to bargain in good faith with the Union as the exclusive representative of all its employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees including warehouse and shipping employees, truck drivers, janitors and leadmen employed at the Employer's Pleasant Valley, Iowa facility; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist the International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW) and its Local 2077, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Pay the striking employees who had not returned to work on July 1, 1979 their vacation pay, with interest in the manner set forth in that portion of this Decision entitled "The Remedy."

(b) Upon request, bargain in good faith with the Union for employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed contract.

(c) Upon their unconditional application, offer strikers not heretofore reinstated immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make whole for any loss of earnings strikers who have made themselves available for employment on an unconditional basis but who were refused reinstatement, with interest.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(e) Post at its Pleasant Valley, Iowa facility copies of the attached notice marked "Appendix."[73] Copies of said notices on forms furnished by the Regional Director for

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[73] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Region 33, shall after being duly signed by Respondent's authorized representative, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 33, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the amended complaints be, and hereby are, dismissed insofar as they allege unfair labor practices not specifically found herein.

Dated, Washington, D.C. *September 30, 1980*

THOMAS D. JOHNSTON
Thomas D. Johnston
Administrative Law Judge

FORM NLRB—4727
(9—69)

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT threaten our employees that if they engage in a strike we will assume they no longer want their jobs.

WE WILL NOT refuse to pay our striking employees who did not return to work on July 1, 1979 their vacation pay because of their participation in the Union's strike.

WE WILL NOT refuse to bargain in good faith with the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL WORKERS OF AMERICA (UAW), as the exclusive representative of our employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL pay those striking employees who did not return to work on July 1, 1979 their vacation pay with interest.

WE WILL upon request, bargain in good faith with the INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL WORKERS OF AMERICA (UAW), as the exclusive representative of our employees in the bargaining unit described below and if an understanding

is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time production and maintenance employees including warehouse and shipping employees, truck drivers, janitors and leadmen employed at the Employer's Pleasant Valley, Iowa facility; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL, upon their unconditional application offer strikers not heretofore reinstated immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make whole for any loss of earnings strikers who have made themselves available for employment on an unconditional basis but who were refused reinstatement, with interest.

ROCKINGHAM MACHINE—LUNEX COMPANY
(Employer)

Dated_____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower—16th Floor 411 Hamilton Avenue, Peoria, IL 61602 Telephone No. (309) 671-7068.

APPENDIX C

September Term, 1981

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1327

Rockingham Machine-Lunex Co., *Petitioner,* vs. National Labor Relations Board, *Respondent.*	Petition for Review of order of the National Labor Relations Board

The Court, having considered petitioner's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

February 4, 1982

APPENDIX D

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . .

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . . .

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

. . . .

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . .

. . . .

§ 160. Prevention of unfair labor practices.

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . .

. . . .

Opposition

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1918

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROCKINGHAM MACHINE-LUNEX COMPANY, PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to bargain in good faith with the Union.

2. Whether substantial evidence supports the Board's finding that the strike of petitioner's employees was caused by petitioner's unfair labor practice.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 8

Conclusion 11

TABLE OF AUTHORITIES

Cases:

NLRB v. *American National Insurance Co.*, 343 U.S. 395 ..... 8, 9

NLRB v. *Insurance Agents*, 361 U.S. 477 8

NLRB v. *Pacific Grinding Wheel Co.*, 572 F. 2d 1343 9

NLRB v. *Reed & Prince Manufacturing Co.*, 205 F. 2d 131, cert. denied, 346 U.S. 887 9

NLRB v. *Truitt Manufacturing Co.*, 351 U.S. 149 9

NLRB v. *Wright Motors, Inc.*, 603 F. 2d 604 9

Pease Co. v. *NLRB*, 666 F. 2d 1044, petition for cert. pending *sub nom.* *Ohio Valley Carpenters Local No. 1787* v. *Pease Co.*, No. 81-1710 (filed Mar. 16, 1982) 9

Pittsburgh-Des Moines Corp. v. *NLRB*, 663 F. 2d 956 9

Page

Statute:

National Labor Relations Act (29 U.S.C. 151 *et seq.*):

Section 8(a)(1), 29 U.S.C. 158(a)(1) 6
Section 8(a)(5), 29 U.S.C. 158(a)(5) 6

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1918

ROCKINGHAM MACHINE-LUNEX COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 665 F. 2d 303. The decision and order of the National Labor Relations Board (Pet. App. B1-B82) are reported at 255 N.L.R.B. No. 15.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1981, and a petition for rehearing was denied on February 4, 1982 (Pet. App. C1). The petition for a writ of certiorari was filed on April 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are set forth in the petition (Pet. App. D1-D2).

STATEMENT

1. In May 1978, after winning a Board-conducted election, the Union,[1] was certified as the bargaining representative of petitioner's employees (Pet. App. B7). Negotiations for a collective bargaining agreement began on June 30, 1978 (*id.* at B8). From that date until August 3, 1979, the parties engaged in 21 negotiating sessions and exchanged a number of letters in an attempt to reach an agreement (*id.* at B9-B48). On May 14, 1979, petitioner's employees went out on strike (*id.* at B42). The parties met three times after the strike began without reaching agreement.

Throughout the negotiations, Peter Kuchirka was the principal spokesman for the Union, and Jim Hodges, a labor consultant, was the spokesman for petitioner. Hodges was authorized to represent petitioner at the bargaining table, and it was understood that any agreements that he reached with the Union were subject to the final approval of Richard Schmidt and his son, William Schmidt, petitioner's president and secretary-treasurer, respectively. Pursuant to this arrangement, Hodges met with petitioner's officers on a regular basis throughout the course of negotiations to keep them apprised of developments at the bargaining table, including agreements he had reached with the Union, and to discuss petitioner's position on negotiating matters. This pattern of bargaining was accepted by the Union. (Pet. App. B7-B9).

The parties held eleven bargaining sessions between June and November 1978, and agreement was reached on a number of proposals offered by the Union and a number of

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[1]International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and Local 2077, UAW.

counter-proposals presented by Hodges.[2] Hodges also raised at this time petitioner's financial difficulties and proposed to place a 25-cent cap on petitioner's existing cost of living wage increase program. (Pet. App. B9-B25).

There were no bargaining sessions held between November 30, 1978, and February 6, 1979. However, during this hiatus Hodges met with petitioner's corporate officers to discuss the progress of negotiations, including the agreements reached at previous sessions and to plan bargaining strategy for future sessions. (Pet. App. B25, B28 n.34; Tr. 421-424).[3] When negotiations resumed on February 7, Hodges informed the Union of his discussions with the corporate officers and assured the Union that he knew petitioner's position on all bargaining matters. Hodges and Kuchirka then reviewed their progress to date and verified all of the agreements previously reached. There was no indication from Hodges that the corporate officers had raised objections to any of the terms previously agreed upon at the bargaining table. (Pet. App. B26-B28 & n.34; Tr. 421-424; GCX 57-5, at 3).

At a subsequent bargaining session held on February 19, Hodges presented the Union with a written statement (GCX 78) setting forth petitioner's position on the progress of negotiations. In the statement, Hodges noted that he had spent a great deal of time reviewing negotiations with President Schmidt, and listed the concessions that petitioner was

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[2]These agreements covered a broad range of non-economic issues including grievance procedure, seniority, leave of absence, layoff and recall, overtime, definition of terms, equal pay for equal work, recognition clause, nondiscrimination, management rights, and safety (Pet. App. B9-B25).

[3]"Tr." refers to the transcript of the hearing before the Administrative Law Judge (ALJ). "GCX" refers to the exhibits offered by the general counsel at that hearing.

prepared to offer. The statement also revealed that petitioner proposed to establish its existing personnel manual, called the "Members Manual," as the basis for an overall agreement and to incorporate the agreements reached at the table into the Manual as the final contract. Hodges then clarified the status of the negotiations by listing the items which had not been agreed upon by the parties. Hodges made no mention of any agreements previously reached to which Schmidt had objected. (Pet. App. B31-B33.)

Following this meeting, Hodges prepared a complete draft of a contract proposal based on the positions he had set forth in the statement he had presented on February 19. In preparing this draft, Hodges used the Members Manual as the basic agreement and added to it the language of the proposals that he and the Union had agreed on at the bargaining table. Hodges gave his draft to the Schmidts for approval, and indicated that the draft proposal was meant to represent a contract that petitioner was willing to sign. President Schmidt, while acknowledging that he and Hodges had previously reviewed those proposals which had been agreed on at the bargaining table, revised Hodges' draft and deleted or changed more than twelve of the provisions that Hodges and Kuchirka had previously agreed to. Both President Schmidt and Secretary-Treasurer Schmidt were aware that they were changing or deleting language previously agreed upon, and Hodges expressed his dissatisfaction with that decision. Nevertheless, petitioner presented this revised draft to the Union in early March of 1979, as a complete contract that petitioner was ready to sign. (Pet. App. B33-B34.)

The parties held three additional negotiating sessions prior to the May 14 strike. At these sessions, Kuchirka stated that the Union would not accept any contract which did not, at a minimum, include those items to which he and

Hodges had previously agreed. Hodges agreed to include three of the rescinded agreements in the contract, but otherwise indicated that petitioner would not alter its position. On other matters, Kuchirka stated that the Union would not seek a wage increase in light of petitioner's financial difficulties, but pressed for an agreement on dues checkoff. Hodges indicated that such an agreement was unlikely since President Schmidt was opposed to checkoff as a matter of principle, but did not elaborate on the reason for Schmidt's opposition. (Pet. App. B34-B40.)

By letter dated April 26, Hodges informed the Union that petitioner was preparing its final offer. Petitioner's final proposal was essentially identical to its draft proposal submitted to the Union in March; it failed to include a number of the provisions to which the parties had previously agreed. Petitioner's final economic proposal was to maintain its existing cost of living program but with a 35-cent cap. (Pet. App. B40-B41.)[4]

On April 29, the Union held a meeting of petitioner's employees for the purpose of discussing the progress of negotiations. Kuchirka reviewed with the employees what had happened over the previous ten months of bargaining and what petitioner's final offer entailed. After pointing out the differences between the parties, Kuchirka told the employees that the negotiating committee believed that petitioner had not been bargaining in good faith, and recommended that the employees strike. The employees

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[4]On April 27, petitioner announced that its employees would receive a ten-cent cost of living increase in May, and that the total cost of living increase for the year would then be 40 cents. Its proposal for a 35-cent cap on the cost of living increases was, therefore, a proposal to give the employees less than they had received without a collective bargaining agreement. (Pet. App. B41 & n.46.)

voted to adopt the bargaining committee's recommendation to strike. (Pet. App. B42; Tr. 705-711, 722-724, 989-990).[5]

The strike began on May 14, 1979 (Pet. App. B42). Beginning in July, the parties held three final negotiating sessions without resolving their differences. At these sessions petitioner proposed, as an alternative to the Union's demand for dues checkoff, that the Union could set up a table to collect its own dues, and offered to raise the cap on its cost of living program to 50 cents. However, petitioner would not agree to restore those agreements which it had previously rescinded, and, following the meeting of August 3, 1979, negotiations were broken off. (Pet. App. B43-B50.)

2. The Board, adopting the findings and conclusions of the Administrative Law Judge, found that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union (Pet. App. B1-B2).[6] The ALJ first enunciated the standard for assessing whether the obligation to bargain in good faith had been met (Pet. App. B64):

> This obligation does not compel either party to agree to a proposal or to make a concession. *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952).

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[5]On May 11, 1979, a number of petitioner's foremen questioned employees about their intentions to join the strike, and told those employees that they would lose their benefits and that management would consider that they had quit their jobs if they joined the strike (Pet. App. B51-B53).

[6]The Board expressly disclaimed reliance on the ALJ's conclusion that petitioner's bad faith was evidenced in part by its failure to vest its negotiator with full final authority, its submission of only 19 proposals in the first ten bargaining sessions, or its failure to document its contention that it was in poor financial condition (Pet. App. B1-B2 n.2).

> The essential element in the bargaining principle is the serious intent of the parties to reach a common ground. *Romo Paper Products Corp.*, 220 NLRB 519 (1975).
>
> A determination of whether a respondent has met the good faith bargaining standard requires consideration of the totality of respondent's conduct. *M.R. & R. Trucking Company*, 178 NLRB 167 (1969), enf'd. in part 434 F. 2d 689 (C.A. 5, 1970); and *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO (Prudential Insurance Company of America)*, 361 U.S. 477, 498 (1960).

He concluded that the totality of evidence, including petitioner's conduct both at and away from the bargaining table, evidenced bad faith. The ALJ relied on background evidence showing petitioner's union animus (Pet. App. B60-B63) as well as the facts that petitioner (Pet. App. B72-B73):

> * * * rescinded contract proposals previously agreed to; possessed a predetermined intention which existed throughout negotiations not to reach an agreement with the Union on dues checkoff[7]; offered only minimal concessions on both non-economic and economic demands; made unfounded threats of plant liquidation or closure to the Union's negotiators; * * * and additionally, that [petitioner] engaged in concurrent unfair labor practices away from the bargaining table by maintaining and enforcing an unlawful no-solicitation rule, made unilateral changes by eliminating July 3 as a

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[7]The ALJ specifically noted that he found unlawful, not petitioner's refusal to agree to a dues checkoff provision, but rather its intent not to reach agreement on that issue (Pet. App. B66).

> paid holiday, threatened employees if they went on strike, and refused to pay certain strikers their vacation pay * * *.[8]

In addition, the Board found, in agreement with the Administrative Law Judge, that the strike was an unfair labor practice strike since it was "caused and prolonged" by petitioner's refusal to bargain in good faith (Pet. App. B74).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A4). The court concluded that there was substantial evidence to support the Board's finding that petitioner refused to bargain in good faith, including testimony that petitioner "rescinded or modified over a dozen provisions to which the parties previously had agreed, offered only minimal concessions to the union, and had a predetermined intention not to reach agreement on dues check-off—a mandatory subject of bargaining" (Pet. App. A4).

ARGUMENT

1. Petitioner asks this Court to decide this case in order to determine whether the Board may properly find that an employer has refused to bargain in good faith where that finding is based solely upon the content of proposals tendered at the bargaining table (Pet. i, 5-9). But that issue is not presented by this case. As shown above, the Board applied the principles approved by this Court in *NLRB* v. *Insurance Agents*, 361 U.S. 477 (1960) and *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952)—*i.e.*, it assessed the totality of petitioner's conduct, both at and away from the bargaining table, and determined that petitioner's conduct was inconsistent with a desire to reach agreement. The only issue actually presented on this record

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[8]Petitioner does not dispute here these findings of concurrent unfair labor practices away from the bargaining table.

therefore is whether, as the court of appeals concluded, substantial evidence supports that finding. Further review of this fact-bound issue is not warranted. *NLRB* v. *American National Insurance Co., supra,* 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).

While, contrary to petitioner's contention (Pet. 5-9), the Board did not rely solely on an assessment of petitioner's bargaining proposals, it did consider that petitioner made only minimal concessions as a factor in its bad faith bargaining determination.[9] It is well established that the Board may "look at the content of the bargaining proposals as part of its review of all the circumstances" in evaluating an employer's overall good faith. *NLRB* v. *Pacific Grinding Wheel Co.,* 572 F. 2d 1343, 1348 (9th Cir. 1978). Accord: *NLRB* v. *Reed & Prince Manufacturing Co.,* 205 F. 2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953); *NLRB* v. *Wright Motors, Inc.,* 603 F. 2d 604, 609 (7th Cir. 1979). See also *NLRB* v. *Truitt Manufacturing Co.,* 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring and dissenting).[10]

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[9]Petitioner also errs in contending (Pet. 8) that the Board relied on its refusal to agree to dues checkoff. As noted (page 7, note 7, *supra*), the ALJ expressly disclaimed such reliance.

[10]Petitioner's reliance (Pet. 7-8, 10) on *Pease Co.* v. *NLRB,* 666 F. 2d 1044 (6th Cir. 1981), petition for cert. pending *sub nom. Ohio Valley Carpenters Local No. 1787* v. *Pease Co.,* No. 81-1710 (filed Mar. 16, 1982), and *Pittsburgh-Des Moines Corp.* v. *NLRB,* 663 F. 2d 956 (9th Cir. 1981), is unavailing. In *Pease,* the court found that "the 'acceptability' of [the employer's] proposals to the Union [was] the touchstone" for the Board's findings. 666 F. 2d at 1049. The court there cited with apparent approval cases in other circuits upholding bad faith bargaining findings based, in part, on the content of bargaining proposals. Similarly, *Pittsburgh-Des Moines* merely disapproved sole reliance on bargaining proposals. 663 F. 2d at 959.

Petitioner also contends (Pet. 9-10) that it did not improperly rescind previous agreements since it was understood that company officials had reserved the right to review the contract, and since the company was willing to enter into an agreement based on its March 6 proposal. However, as shown above, (pages 7-8, *supra*), the company's bad faith is evidenced not by the fact that President Schmidt objected to some of the agreements reached by Hodges, but by the timing of his objections—after eight months of negotiations, even though he was kept apprised of events throughout the course of negotiations and never voiced his objections earlier. In these circumstances, petitioner's assertion (Pet. 7) that it demonstrated a willingness to reach agreement when it offered the Union a complete contract in March 1979, is belied by the fact that this offer ignored the progress achieved in the prior eight months of negotiations and rescinded, without explanation, many of the agreements previously reached at the bargaining table.

2. Similarly, the second question raised by the petition (Pet. i, 11)—whether the Board may find a strike to be an unfair labor practice strike without evidence that the strike was caused by unfair labor practices—is not presented by this case. The record here shows that the employees' decision to strike was based on the failure of the negotiations to produce an agreement, and was made after the Union negotiator reported on the history of the negotiations and expressed the belief that petitioner had not bargained in good faith (pages 5-6, *supra*). The ALJ expressly noted that the employees voted to strike "after being informed of what had transpired during negotiations * * *" (Pet. App. B74). Petitioner's second question therefore also presents only an evidentiary issue, which does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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